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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 399

PENN DAIRIES, INC., AND THE UNITED STATES OF AMERICA, APPELLANTS

vs.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

FILED SEPTEMBER 15, 1942

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In Supreme Court of Pennsylvania

Docket entries

January Term, 1942—No. 173

(C. P. Lancaster County)

PENN DAIRIES, INC., PLAINTIFF

vs.

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, DEFENDANT

Appeal of Plaintiff From the Judgment of the Superior Court at No. 311 October Term, 1941, Affirming the Order of the Court of Common Pleas of Lancaster County at Trust Book No. 34, Page 274

Same Record as No. 180, January Term, 1942

Harris C. Arnold, Frank E. Coho, Dep. Atty. Genl., Claude T. Reno, Atty. Genl. 4-9-42.

Gerald A. Gleeson, U. S. Atty., J. Barton Rettew, Jr., Asst. U. S. Atty., 4-15-42, for the United States, Intervenor.

Appeal from the Superior Court. Filed April 6, 1942, Eo die Certiorari exit. Returnable second Monday May 1942.

April 6, 1942. Record returned and filed.

April 18, 1942. Assignments of Error, filed.

March 12, 1942. Petition for allowance of appeal from the Superior Court to the Supreme Court, filed. Harris C. Arnold.

March 14, 1942. Acceptance of Service, filed.

March 19, 1942. Answer to Petition, filed. Frank E. Coho, Deputy Attorney General.

March 27, 1942. Allocatur allowed. By the Court.

April 15, 1942. Petition for Supersedeas, filed. Arnold & Bricker.

And now, April 15, 1942, upon consideration of the within petition and the accompanying consent of the appellee, it is ordered that the appeal from the Superior Court in the above-entitled case shall be and operate as a supersedeas. Wm. I. Schaffer, Chief Justice.

* * * (Excerpt from Order filed April 15, 1942, at No. 180 January Term, 1942) * * * and it is directed that said appeal be heard with case of Penn Dairies, Inc., vs. The Milk Control Commission of Pennsylvania, No. 173, January Term, 1942.

The United States is allowed to intervene in the appeal of Penn Dairies, No. 173, January Term, 1942. By the Court, Wm. I. Schaffer, Chief Justice.

May 11, 1942. Stipulation filed. (No Order made.)

May 11, 1942. Argued.

May 25, 1942. Judgments affirmed. Per Curiam.

2 June 3, 1942. Petition to retain the record filed. Gerald A. Gleeson, U. S. Attorney, J. Barton Rettew, Asst. U. S. Atty. Harris C. Arnold, for Penn Dairies.

And now, to wit, this 3rd day of June 1942, it is hereby ordered that on consideration of the foregoing petition the record in the case of Penn Dairies, Inc., Appellant, and The United States of America, Intervenor, Appellant v. The Milk Control Commission of the Commonwealth of Pennsylvania, being January Term, 1942, Nos. 173 and 180 shall be retained in the Prothonotary's office of the Supreme Court of Pennsylvania, Eastern District, Philadelphia, Pennsylvania, for a period of 60 days beyond the expiration date set forth in Rule 88 of this court. Wm. I. Schaffer, Chief Justice.

July 27, 1942. Petition for reargument filed. Gerald A. Gleeson, U. S. Attorney. Arnold & Bricker.

Eo die, Acceptance of Service petition for reargument, filed. Frank E. Coho, Deputy Attorney General.

July 27, 1942. Assignments of Error filed.

July 27, 1942. Petition for allowance of appeal to the Supreme Court of the United States, filed. Gerald A. Gleeson, U. S. Attorney. Arnold & Bricker.

July 27, 1942. Statement as to Jurisdiction filed. Gerald A. Gleeson, U. S. Attorney. Arnold & Bricker.

July 30, 1942. Answer to petition for appeal to the Supreme Court of the United States and waiver of notice, filed. Claude T. Reno, Attorney Genl. Frank E. Coho, Deputy Atty. General.

3 August 8, 1942. Reargument refused. Per. Curiam.

August 8, 1942, Petition for Supersedeas, filed. Gerald A. Gleeson, U. S. Attorney. Arnold & Bricker.

August 8, 1942, Order allowing appeal to the Supreme Court of the United States, received and filed as follows:

"And now, August 8, 1942, it is ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Pennsylvania in the above entitled case, as provided by law, and it is further ordered that the Prothonotary of the Supreme Court of Pennsylvania shall prepare a certified transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of

the United States, so that he shall have the same in said Court within forty days of this date.

And it is further ordered that security for costs on appeal and to act as a supersedeas be fixed in the sum of $500.00. Wm. I. Schaffer, Chief Justice of the Supreme Court of Pennsylvania.

August 8, 1942. Bond on appeal to the Supreme Court of the United States, filed, with Order as follows:

"August 8, 1942. The within Appeal Bond is hereby approved and ordered filed. Wm. I. Schaffer, Chief Justice."

4 And now, August 8th, 1942, upon consideration of the within petition, Appellee having waived notice and objection thereto, and appeal bond in the amount of $500.00 having been filed by Penn-Dairies, Inc., and approved, it is ordered that the appeal of the United States of America and Penn Dairies, Inc. to the Supreme Court of the United States from judgment of the Supreme Court of Pennsylvania shall be and operated as a supersedeas. Wm. I. Schaffer, Chief Justice of the Supreme Court of Pennsylvania.

August 11, 1942. Designation of parts of Record to be included in Transcript of Record, filed. Gerald A. Gleeson, United States Attorney Arnold & Bricker.

August 18, 1942. Citation and Acceptance of Service of Citation on behalf of the Milk Control Commission, filed.

August 18, 1942. Proofs of Service of Citation of Appeal and Designation of parts of the Record to be included in the transcript on Appeal to the Supreme Court of the United States, filed. Arnold & Bricker.

August 28, 1942. Statement against Jurisdiction of Supreme Court of the United States and motion to dismiss or affirm appeal, filed. Claude T. Reno, Attorney General, Frank E. Coho, Deputy Attorney General.

In Supreme Court of Pennsylvania

Docket entries

January Term, 1942—No. 180

(C. P. Lancaster)

PENN DAIRIES, INC., THE UNITED STATES OF AMERICA, INTERVENTOR, APPELLANT

vs.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

Appeal of The United States of America from the judgment of the Superior Court, at No. 3 October Term, 1942, dismissing

Appeal from the Court Common Pleas of Lancaster County to Trust Book #34, page 274

Same record as No. 173, January Term, 1942

Harris C. Arnold. 4-15-42.

Frank E. Coho, Dep. Atty. Genl., Claude T. Reno, Atty. Genl. 4-24-42.

Gerald A. Gleeson, United States Attorney. J. Barton Rettew, Jr., Asst. U. S. Attorney.

Appeal from Superior Court. Filed April 15, 1942. Eo die Certiorari exit. Retble. 2d. Monday May 1942.

April 15, 1942. Record returned and filed.

April 17, 1942. Assignments of Error filed.

April 15, 1942. Petition for leave to appeal from the judgment of the Superior Court, and for leave to intervene, and to join in the appeal in Penn Dairies, Inc., vs. Milk Control Commission of the Commonwealth of Pennsylvania at No. 173 January Term, 1942, filed. Gerald A. Gleeson, United States Attorney, J. Barton Rettew, Jr., Asst. U. S. Attorney.

And now, April 15, 1942, on consideration of the within petition it is ordered and decreed as follows:

The United States of America is allowed to appeal from the judgment of the Superior Court; and it is directed that said appeal be heard with the case of Penn Dairies, Inc., vs. The Milk Control Commission of Pennsylvania, No. 173 January Term, 1942.

The United States is allowed to intervene in the appeal of Penn Dairies, No. 173, January Term, 1942. By the Court, Wm. I. Schaffer, Chief Justice.

May 11, 1942. Stipulation filed. (No Order made.)

May 11, 1942. Argued.

May 25, 1942. Judgments affirmed. Per Curiam.

6 June 3, 1942. Petition to retain the record, filed. Gerald A. Gleeson, U. S. Atty., J. Barton Rettew, Jr., Asst. U. S. Atty., Harris C. Arnold for Penn Dairies.

And now, to wit, this 3rd day of June 1942, it is hereby ordered that on consideration of the foregoing petition the record in the case of Penn Dairies, Inc., Appellant and The United States of America, Intervenor, Appellant, v. The Milk Control Commission of the Commonwealth of Pennsylvania, being January Term, 1942, Nos. 173 and 180, shall be retained in the Prothonotary's Office of the Supreme Court of Pennsylvania, Eastern District, Philadelphia, Pennsylvania, for a period of 60 days beyond the expiration date set forth in Rule 88 of this court. Wm. I. Schaffer, Chief Justice.

July 27, 1942. Petition for reargument filed. Gerald A. Gleeson, U. S. Attorney. Arnold & Bricker.

Eo die Acceptance of service of petition for reargument filed. Frank E. Coho, Deputy Attorney General.

July 27, 1942. Petition for allowance of appeal to the Supreme Court of the United States, filed. Gerald A. Gleeson. Arnold & Bricker.

July 27, 1942. Statement as to Jurisdiction filed. Gerald A. Gleeson, U. S. Atty. Arnold & Bricker.

July 30, 1942. Answer to petition for appeal to the Supreme Court of the United States and waiver of notice filed. Claude T. Reno, Attorney General. Frank E. Coho, Deputy Attorney General.

7 July 27, 1942. Assignments of Error filed.

August 8, 1942. Petition for Supersedeas, filed. Gerald A. Gleeson, U. S. Attorney. Arnold & Bricker.

August 8, 1942. Order allowing appeal to the Supreme Court of the United States, filed as follows:

And now, August 8, 1942, it is ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Pennsylvania in the above entitled case, as provided by law, and it is further ordered that the Prothonotary of the Supreme Court of Pennsylvania shall prepare a certified transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within forty days of this date.

And it is further ordered that security for costs on appeal and to act as a supersedeas be fixed in the sum of $500.00. Wm. I. Schaffer, Chief Justice of the Supreme Court of Pennsylvania.

August 8, 1942. Bond on appeal to the Supreme Court of the United States, filed with order as follows:

"August 8, 1942. The within Appeal Bond is hereby approved and ordered filed. Wm. I. Schaffer, Chief Justice."

8 And now August 8th, 1942, upon consideration of the within petition, Appellee having waived notice and objection thereto, and appeal bond in the amount of $500.00 having been filed by Penn-Dairies, Inc., and approved, it is ordered that the appeal of the United States of America and Penn Dairies, Inc., to the Supreme Court of the United States from judgment of the Supreme Court of Pennsylvania shall be and operate as a supersedeas. Wm. I. Schaffer, Chief Justice of the Supreme Court of Pennsylvania.

August 11, 1942. Designation of parts of Record to be included in Transcript of Record, filed. Gerald A. Gleeson, United States Attorney. Arnold & Bricker.

August 18, 1942. Citation and Acceptance of Service of Citation on behalf of the Milk Control Commission, filed.

August 18, 1942. Proofs of Service of Citation of Appeal and Designation of parts of the Record to be included in the transcript on Appeal to the Supreme Court of the United States, filed. Arnold & Bricker.

August 28, 1942. Statement against Jurisdiction of Supreme Court of the United States and motion to dismiss or affirm appeal, filed. Claude T. Reno, Attorney General, Frank E. Coho, Deputy Attorney General.

9 Before the Milk Control Commission of Pennsylvania

Docket entries

March 5, 1941. Citation to Penn Dairies, Inc. to show cause why its application for a milk dealer's license for the year May 1, 1941 to and including April 30, 1942, should not be refused, or the granting thereof suspended.

March 11, 1941. Answer of Penn Dairies, Inc. filed.

March 18, 1941. Hearing held.

March 25, 1941. Order of Commission refusing application of Penn Dairies for milk dealer's license for the year May 1, 1941 to April 30, 1942.

In Court of Common Pleas of Lancaster County

Docket entries

April 7, 1941. Appeal by Penn Dairies from order of the Milk Control Commission.

April 7, 1941. Appeal to operate as supersedeas allowed by the Court.

April 26, 1941. Answer to appeal filed.

10 June 9, 1941. Motion for leave to file suggestion of interest of United States in matter in litigation.

June 9, 1941. Suggestion of interest of the United States in the matter in litigation filed by leave of Court.

June 9, 1941. Order made by the Court.

June 16, 1941. Record from Milk Control Commission received and filed.

June 16, 1941. On argument list, argued c. a. v.

July 25, 1941. Opinion read and filed and appeal from special order of Milk Control Commission dated March 25, 1941, refusing Penn Dairies, Inc., a milk dealer's license, order is sustained. Schaeffer, Judge.

July 31, 1941. Petition for order of Supersedeas filed and allowed and bond in sum of $500.00 approved and filed.

July 31, 1941. Appeal to Superior Court filed.

July 31, 1941. Certiorari from Superior Court filed.

Before the Milk Control Commission of Pennsylvania

Citation

March 5, 1941

To the Above-Named Defendant [*Penn Dairies, Inc.*]

You are hereby notified that a hearing will be held at the offices of the Milk Control Commission of the Commonwealth of Pennsylvania, Third Floor, Telegraph Building, Harrisburg, Pennsylvania, on Thursday, March 6, 1941, at 10:00 o'clock a. m. Eastern Standard Time, at which time and place you are hereby required to appear with all books, records and papers relating to the following matters to show cause why the Milk Control Commission should not refuse to grant or suspend the granting
11 of a milk dealer's license to you for the year May 1, 1941, to April 30, 1942, inclusive.

You are particularly cited for and this hearing will concern itself with violations of the Milk Control Law of April 28, 1937, P. L. 417, and the rules, regulations and orders of the Milk Control Commission issued pursuant thereto, the following being a statement of the violations with which this hearing will be concerned:

1. The defendant, Penn Dairies, Inc., is a corporation organized under the laws of the Commonwealth of Pennsylvania, doing business as a milk dealer in several parts of the Commonwealth of Pennsylvania and having its principal place of business in Lancaster, Pennsylvania, at 572 North Queen Street, and at 623 Second Street.

2. The defendant, Penn Dairies, Inc., has applied to the Milk Control Commission of Pennsylvania for a milk dealer's license for the year May 1, 1941 to April 30, 1942, inclusive.

3. On or about February 1, 1941, the purchasing and contracting officer of the Quartermaster at Indiantown Gap, Pennsylvania, sent to the defendant Penn Dairies, Inc., at Lancaster, Pennsylvania, a standard government form of invitation for bids, Form No. 30, Invitation No. QM 517-41-14, accompanied by standard government form of bid No. 31, and standard government form of continuance, Schedule No. 36.

4. Said standard form No. 30 as issued by the purchasing and contracting officer read as follows:

12 "Standard Government Form of Invitation for Bids

(Supply Contract)

Invitation No. QM 517–41–14

February 1, 1941.

"Sealed Bids, in triplicate will be received in this office until the date and hour named in the accompanying schedules and then publicly opened, for furnishing the materials and supplies called for therein.

"Bids must be submitted upon the Standard Government Form of Bid (Standard Form No. 31), and in accordance with the Standard Government Instructions to Bidders (Standard Form No. 22) and any special instructions suplementary thereto.

"Envelopes containing bids must be sealed and marked on the upper left-hand corner with the name and address of the bidder and the date and hour of opening and adressed to the purchasing agency named below:

"Purchasing and Contracting Officer, Office of the Quartermaster, Indiantown Gap, Pennsylvania.

"Marked: Bid for Milk, Buttermilk and Ice Cream.

March 1 to June 30, 1941, requirements.

"To be opened: 10:00 a. m. Eastern Standard Time, February 15, 1941.

Special purchase conditions, attached to said invitation for bids, provided, in part, as follows:

13 "1. General: Bids are invited for supplies as specified in this invitation, all or any part thereof, to be delivered as specified, all transportations, switching or drayage charges to be prepaid by the contractor and supplies to be subject to final inspection and acceptance at destination.

. . . . . .

23 . . .

"Milk, Bread, & Ice Cream.—Deliveries of Milk, Bread, and Ice Cream will be made daily to Military Organization Barracks, Indiantown Gap, Pa., on days called for by the Quartermaster, or his authorized representative, and at such time as directed. It is understood and agreed that the milk bottles and all containers shall remain the property of the contractors and every possible precaution will be maintained to preserve same in the original state, but in the event of damage to these articles while in the possession of the Government, the Government will not be held respon-

sible for such damages, as the purchase in question is a purchase of contents only."

5. Thereafter and prior to 10:00 a. m., Eastern Standard Time, February 15, 1941, Penn Dairies, Inc., in accordance with said invitation for bids, offered by writing delivered to said purchasing and contracting officer, to sell to the purchasing and contracting officer in the office of the Quartermaster, Indiantown Gap, Pennsylvania, 135,000 one quart bottles of fresh pasteurized milk at $0.079 per bottle, and 540,000 half pint bottles of fresh pas-
14 teurized milk at $0.0215 per bottle. The schedule for bid and the defendant's bid described 135,000 quarts of fresh milk, and the 540,000 half pints of fresh milk as items Nos. 1 and 3 respectively, in said bid, the respective descriptions in said invitation and bid reading as follows:

"Item No. 1—Milk, Fresh, Grade A, Pasteurized, 1 Qt. Bottles, W/Sanitary Protective Type Caps. Type 11 C-M-381B 135,000 Btl.

"Item No. 3—Milk, Fresh, Grade A, Pasteurized, ½ Pt. Bottles, W/Sanitary Protective Type Caps. Type 11 C-M-381B 540,000 Btl."

6. Indiantown Gap, a United States Military Reservation, is an institution of the United States for military training, situate in the northwestern part of Lebanon County between state highway route No. 443 and state highway route No. 343 in the State of Pennsylvania, and is situate in Area No. 11 of Pennsylvania, as designated by the Milk Control Commission of Pennsylvania, being the State-Wide Milk Marketing Area.

7. Minimum wholesale prices to be charged by milk dealers for milk sold in bottles or other containers in Area No. 11, the State-Wide Milk Marketing Area, are established by Official General Order No. A-6 of the Milk Control Commission, as amended by Official General Order No. A-14, in Section 4, subdivision (b).

8. Grade A pasteurized milk, as described in the aforesaid invitation to bid, is equivalent to Grade B milk as described in Offi-
15 cial General Orders Nos. A-6 and A-14 of the Milk Control Commission and other price fixing orders of the Commission. The part of Section 4 (b) of Official General Order No. A-14, amending and superseding that portion of Official General Order No. A-6 that applies to the present case, reads as follows:

"(b) Minimum Wholesale Prices. Milk dealers to other milk dealers and to stores for resale; and to bakeries, hotels, restaurants, hospitals and institutions for consumption on the premises:

Product	Unit price		
	Quart	Pint	Half-pint
Grade "A" Milk	$0.145	$0.06	$0.035
Grade "B" Milk:			
Exceeding 4% B. F.	.105	.06	.035
Not Exceeding 4% B. F.	.095	.05	.035
Grade "B" Milk to Schools: Not Exceeding 4% B. F.			.027

The above price to schools includes service charges for ice, straws, or special boxes. If these services are not rendered, the above prices may be reduced by $0.0025 per half-pint.

9. The Milk Control Commission has treated Indiantown Gap Military Reservation as an educational institution or school thereby allowing the benefit of an interpretation of such official general orders Nos. A-6 and A-14 favorable to the application of the lowest minimum prices possible for milk sold to Indiantown Gap Military Reservation, and announced to all known interested parties, including the defendant, Penn Dairies, Inc., that the minimum prices to be charged by milk dealers for fresh pasteurized milk in half pints sold to the purchasing and contracting officer at Indiantown Gap shall be $0.025 per half pint of milk where Grade B milk as described in said official general orders is furnished and there are no special services of ice, straws or special boxes, as will appear by a copy of a notice sent to milk dealers interested in the aforesaid invitations for bids on February 4, 1941, a true and correct copy being hereto attached being made a part hereof and marked Exhibit "A."

10. On February 15, 1941, at 10:00 o'clock a. m., Eastern Standard Time, the aforesaid bid of the defendant Penn Dairies, Inc. as well as other bids submitted, were opened by the purchasing and contracting officer in the office of the Quartermaster, Indiantown Gap, Pennsylvania, and thereafter the offer of the defendant, Penn Dairies, Inc. to sell 135,000 quarts of fresh pasteurized milk and 540,000 half pints of fresh pasteurized milk, as hereinbefore stated, was accepted and a contract thus entered into.

11. The defendant, Penn Dairies, Inc., in accordance with the said offer to sell and contract for, has delivered milk to several mess halls and other places at said Indiantown Gap Military Reservation.

12. The milk so delivered was received from milk producers in and near Lancaster County, Pennsylvania, by defendant, Penn Dairies, Inc., at its place of business at 623 Second Street, Lancaster, Pennsylvania, where it was weighed,

tested, processed, bottled, capped, crated and loaded on trucks of the defendant for delivery by employees of the defendant to said Indiantown Gap Military Reservation.

13. The prices at which the defendant, Penn Dairies, Inc., offered to sell and did sell milk to the purchasing and contracting officer at the office of the Quartermaster, Indiantown Gap, Pennsylvania, were $0.079 instead of $0.095 for quarts of fresh pasteurized milk in quart bottles, and $0.0215 instead of $0.025 for half pints, as respectively provided in subdivision B of Section 4 of Official General Order A–6, as amended by Official General Order A–14, and therefore said offer to sell and the sales thereof are in violation of Section 807 of the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j, and the application for Penn Dairies, Inc., for a milk dealer's license for the year May 1, 1941, to and including April 30, 1942, should be refused, or the granting of the application suspended under Section 404 (10) of the Milk Control Law.

This hearing is held by the Milk Control Commission pursuant to the authority vested in it by the Milk Control Law of April 28, 1937, P. L. 417.

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,
By: EDWIN H. RIDGEWAY, *Secretary.*

Dated:

18

Exhibit "A" to citation

COMMONWEALTH OF PENNSYLVANIA
MILK CONTROL COMMISSION

HARRISBURG, PENNA., *February 4, 1941.*

To All Milk Dealers Interested In Submitting Bids to Furnish Milk to the United States Government at Indiantown Gap, Penna. During the Period from March 1 to June 30, 1941, Inclusive:

The United States Government is asking for bids to be submitted to the Purchasing and Contracting Officer, Office of the Quartermaster, Indiantown Gap, Lebanon County, Pennsylvania, on its requirements for milk and buttermilk for delivery at that point during the period from March 1 to June 30, 1941, inclusive. The opening date for these bids is 10:00 a. m., E. S. T., February 15, 1941, at Indiantown Gap, Pennsylvania.

Among the items included in the schedules accompanying the standard form of bid, Invitation No. qm517–41–14, bids are requested for the following milk items:

Item No. 1

135,000 quarts Milk, Fresh, Grade A, Pasteurized, 1 quart Bottles, with Sanitary Protective Type Caps. Type II (Federal Specifications C–M–381B).

Item No. 2 (Alternate)

135,000 quarts Milk, Fresh, Grade A, Pasteurized, 1 quart Fiber Containers, Nonreturnable. Type II (Federal Specifications C–M–381B).

Item No. 3

540,000 Half-Pints Milk, Fresh, Grade A, Pasteurized, ½ Pint Bottles, with Sanitary Protective Type Caps. Type II (Federal Specifications C–M–381B).

Item No. 4 (Alternate)

540,000 Half-Pints Milk, Fresh, Grade A, Pasteurized, ½ Pint Fiber Containers, Non-returnable. Type II (Federal Specification C–M–381B).

Item No. 5

5,760 quarts Buttermilk, Plain, Pasteurized, 1 quart Bottles. Type A (Federal Specifications C–B–816).

Item No. 6 (Alternate)

5,760 quarts Buttermilk, Plain, Pasteurized, 1 quart Fiber Containers, Non-returnable. Type A (Federal Specifications C–B–816).

The quantities for the above items are listed as the estimated quantities required for each month during the period from March 1, 1941, to June 30, 1941, inclusive.

For your information and guidance, we are enclosing herewith a copy of our Official General Order A–14, applicable to Area No. 11, the Statewide Milk Marketing Area, in which area Indiantown Gap, Pennsylvania, is located, and direct your attention to subparagraph (b), Section 4, of said Order, setting forth the minimum wholesale prices to be charged by or paid to milk dealers for Grade A milk, either raw or pasteurized; for Grade B milk, either raw or pasteurized, not exceeding 4.0% butterfat content; and for Plain Buttermilk, sold in bottles or other containers, in said Area No. 11.

The Commission construes the Government Facility at Indiantown Gap, Pennsylvania, as a training camp or reservation, and as such, where milk is required in half-pint bottles or half-pint fibre containers, would be entitled to the special wholesale half-pint school prices of said Order No. A–14.

Where milk dealers propose to furnish Grade A milk, pasteurized Grade B milk, not exceeding 4.0% butterfat content, or Plain Buttermilk, meeting Federal Specifications, the following minimum unit prices should be considered in the preparation of their bids:

Product	Unit prices	
	Quarts	Half-pints
Grade A Milk, either raw or pasteurized	$0.115	[1] $0.035
Grade B Milk, either raw or pasteurized, not exceeding 4.0% Butterfat Content	.095	[1] .0275
Plain Buttermilk	.07	

[1] Includes service charges for ice, straws, or special boxes. If these services are not rendered, these prices may be reduced by $0.0025 per half-pint.

The Commission suggests that milk dealers acquaint themselves with Federal Specifications for milk, particularly C–M–381B.

Any purchases or sales of milk made or offers to buy or sell milk at prices below the prescribed minimum prices of effective Official General Orders of this Commission are construed as violations of the Milk Control Law.

21 The Milk Control Commission expects compliance with its orders, rules, and regulations, and will appreciate your cooperation in this matter.

COMMONWEALTH OF PENNSYLVANIA
MILK CONTROL COMMISSION,
EDWIN H. RIDGWAY, *Secretary.*

Before the Milk Control Commission

Answer of Penn Dairies, Inc. to citation

Filed March 11, 1941

Penn Dairies, Inc., the respondent in the above matter makes answer to the citation issued against it therein, as follows (the term "the commission" as used herein shall mean the Milk Control Commission of the Commonwealth of Pennsylvania, the complainant):

1. The averments of paragraph 1 are admitted.
2. The averments of paragraph 2 are admitted.

3. The averments of paragraph 3 are admitted.

4. The averments of paragraph 4 are admitted.

5. The averments of paragraph 5 are admitted.

6. The averments of paragraph 6 are admitted.

7. The averments of paragraph 7 are admitted but respondent denies that said order and price fixing is valid, for reasons hereinafter set forth.

8. Respondent admits the averments of the first sentence of paragraph 8 of the citation. Respondent admits that the part of Section 4 (b) of Official General Order No. A-14 which the commission seeks to apply to the present case, is as set forth in the remainder of said paragraph 8. Respondent denies that said portions of said order are legally applicable to the present case.

22 9. The averments of paragraph 9 are admitted.

10. The averments of paragraph 10 are admitted.

11. The averments of paragraph 11 are admitted.

12. The averments of paragraph 12 are admitted.

13. Respondent admits that it offered to sell and did sell to the purchasing and contracting officer of the United States at the office of the Quartermaster, Indiantown Gap, Pa., quart bottles of fresh pasteurized milk at $0.079 per quart, and half pint bottles at $0.0215 per bottle. Respondent admits that the order of the Commission which the Commission seeks to apply to said contract and to this case, purports to fix a minimum price of $0.095 per quart for such milk in quart bottles and $0.0250 per half pint for such milk in half pint bottles. Respondent, for reasons hereinafter set forth, denies that said order is applicable or legally applicable to said contract and this case, and therefore denies that its action is in violation of any valid or applicable law, order, or regulation and particularly denies the violation of Section 807 of the Milk Control Law of April 28, 1937, P. L. 417. Respondent avers that its application should be neither refused nor the granting thereof be suspended.

NEW MATTER

In further answer to said citation, the respondent avers as follows:

14. The Commission is without jurisdiction under the laws and constitution of Pennsylvania or under the laws and constitution of the United States to limit, regulate, control or interfere with the prices or other terms of a contract between the respondent and the United States or any agency or instrumen-
23 tality thereof, or to limit, regulate, control or interfere with any sale by the respondent to the United States or any agency or instrumentality thereof.

15. Insofar as any statute of Pennsylvania purports to confer on the Commission any power to do any act mentioned in the last preceding paragraph, such statute is in violation of the Constitution of the United States, and void.

16. Insofar as any order, ruling or regulation of the Commission purports, and insofar as the Commission attempts or asserts a right to do any act mentioned in paragraph No. 14 supra such order, ruling or regulation, and such action of the Commission is or would be in violation of the Constitution of the United States, and void.

17. As applied to the contract referred to in the citation in this case, and the sale of milk under said contract, the said order of the Commission and enforcement thereof with respect to said contract and sale would be and is arbitrary, unreasonable, discriminatory, illegal, unconstitutional, and void, and would deprive the respondent of property and its right to contract, without due process of law and in contravention of the law of the land.

18. Respondent particularly avers with respect to said Order of the Commission, in support of the foregoing allegations, as follows:

19. Said Order contains no schedule of minimum prices which are reasonably applicable to the said contract and sale, considering the size and quantities of milk involved, the method and place or area of delivery, and the reduced costs growing therefrom.

20. The said Order of the Commission was prepared and promulgated without contemplation of a contract and sale and delivery of milk in such large quantities to a single consumer, and the prices therein fixed are based on materially higher costs resulting from sales in much smaller amounts and under entirely different circumstances.

21. The said contract calls for delivery of greater quantities of milk per day and per month than any contract heretofore known by the Commission or by the respondent in Pennsylvania and the possibility of such sales was not considered in the preparation and promulgation of said Order.

22. All milk under said contract is delivered to a single consumer, the United States Army Quartermaster, Indiantown Gap, Pa., at a single army cantonment.

23. The cost to the respondent to supply the milk under said contract is materially less than costs of ordinary or even the largest quantity sales made in general commercial milk business by reason of quantity production in preparation and bottling, lower bottle losses, and lower delivery costs by reason of delivery of large quantities, in full truck loads to single destinations.

24. The prices which respondent would be required to charge under said order would be excessive, with respect to the respondent's costs.

25. The prices which respondent would be required to charge under said order are disproportionately high as compared with prices fixed by said order for wholesale sales of milk in ordinary quantities and under ordinary circumstances.

25 26. With respect to said contract and sale, said prices fixed by said Order bear no reasonable relation to the public interest or stabilization of the milk industry.

27. Therefore, respondent avers that it has not violated any valid and enforcible law, order, or regulation in entering into or in selling milk under said contract, and therefore its action thereunder provides no legal ground upon which it may be deprived of or refused a permit under the Milk Control Law.

PENN DAIRIES, INC.
By J. F. GARBER, *Treas.*

Before the Milk Control Commission

Reply to new matter contained in answer of respondent

The Milk Control Commission of the Commonwealth of Pennsylvania, complainant in the above matter, answers the new matters contained in the answer to the citation issued in the above case, as follows:

14. The Milk Control Commission of the Commonwealth of Pennsylvania, complainant in the above case, hereinafter sometimes referred to as the "Commission," denies that it is without jurisdiction under the laws and Constitution of Pennsylvania, or under the laws of the Constitution of the United States, to limit, regulate, control or interfere with the prices or other
26 terms of a contract between the respondent and the United States, or any agency or instrumentality thereof, or to limit, regulate, control, or interfere with any sale by the respondent to the United States, or any agency or instrumentality thereof, and in answer thereto avers that although the Milk Control Commission of Pennsylvania cannot limit, regulate, control or interfere with the United States or any agency or instrumentality thereof in the performance of its governmental functions, the Milk Control Commission of Pennsylvania, under its inherent police power, is authorized to regulate the milk industry of Pennsylvania to assure the inhabitants of Pennsylvania a constant and adequate supply of pure and wholesome milk, and such regulation includes the regulation of all milk dealers including

the respondent, regardless of who their customers may be, and that maintaining adequate prices to be charged by milk dealers for milk requires that all milk dealers be treated alike under the orders of the Commission so that a temporary advantage to one particular dealer as in this case will not result in creating unstable marketing conditions for milk dealers generally in Pennsylvania.

15. The Commission denies that insofar as any statute of Pennsylvania purports to confer on the Commission any power to do any act that the Commission contends under the last preceding paragraph it has a right to do such statute is in violation of the Constitution of the United States and void, and in answer thereto the Commission avers that the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j, is within the police power of the Commonwealth of Pennsylvania, and the tenth amendment to the Constitution of the United States.

27 16. The Commission denies the averments of paragraph 16 of the answer to the citation, and in answere thereto avers that any order, ruling, or regulation of the Commission asserting a right to do any act that the Commission avers it can do in paragraph 14 above is in consonance with the Constitution of the United States because within the police power of the Commonwealth of Pennsylvania and the protection of the tenth amendment to the Constitution of the United States.

17. The Commission denies the averments of paragraph 17 of the answer to the citation, and in answer thereto avers that as applied to the contract referred to in the citation in this case and the sale of milk under said contract said order of the Commission and enforcement thereof with respect to said contract and sale are not arbitrary, unreasonable, discriminatory, illegal, unconstitutional, or void on their face, and that any unreasonableness of said order cannot be raised in this proceeding but must be raised in a proceeding before the Commission for revision or amendment of said order.

18-19. The Commission denies the allegations contained in paragraph 18 and 19 of the answer to the citation, and in answer thereto avers that said order does contain a schedule of minimum prices reasonably applicable to said contract and sale, as set forth in said citation, and that if a different minimum price should be established that matter must be determined by a petition to the Commission to revise or amend said order and action of the Commission thereon, including reasonable notice to all interested parties.

20. The Commission denies the allegations of paragraph
28 20 of the answer to the citation, and in answer thereto avers that said order of the Commission was prepared and pro-

mulgated in contemplation of all contracts and sales that would arise unless and until it was shown to the Commission that a lower minimum price could be fixed and an adequate supply of pure and wholesome milk for inhabitants of the Commonwealth of Pennsylvania be maintained thereunder. In further answer to paragraph 20 the Commission avers that the minimum prices fixed in said order are based on all the factors that the Commission must take into consideration in promulgating such minimum prices, and that any change in the minimum prices fixed in said order must be by a proceeding to revise or amend said order and cannot be used as a defense to a proceeding to punish the defendant for violation of said order.

21. The Commission admits that said contract calls for delivery of greater quantities of milk per day and per month than any contract heretofore brought to the attention of the Commission, but the Commission denies that said order was not intended to apply to such contracts as the contract in the present case, and further avers that said order of the Commission remains effective until action is brought by or before the Commission for the purpose of amending or revising said order.

22. The Commission admits the allegations of paragraph 22 of the answer to the citation.

23. The Commission neither admits nor denies the allegations of paragraph 23 of the answer to the citation, and avers that said facts are within the knowledge of the respondent and the Commission therefore demands proof of said facts. The Com-
29 mission denies that said facts even if proved are material to this case unless and until the respondent petitions the Commission to revise or amend said order and the Commission did revise or amend said order or refused to do so.

24. The Commission neither admits nor denies the allegations of paragraph 24 of the answer to the citation, and avers that said facts are within the exclusive knowledge of the respondent, and therefore demands proof of the same. The Commission denies that said facts, even if proved, are relevant in this proceeding and further avers that the prices fixed under said order are effective unless and until the respondent petitions the Commission to revise or amend said order and the Commission acts or refuses to act thereon.

25. The Commission denies the allegations of paragraph 25 of the answer to citation and in answer thereto avers that unless and until evidence is presented to the Commission in a proceeding to revise or amend said order showing that the prices fixed thereunder are disproportionately high as compared with prices fixed for wholesale sales of milk in ordinary quantities the prices fixed in said order must remain in full force and effect.

26. The Commission denies the allegations of paragraph 26 of the answer to the citation, and in answer thereto avers that with respect to said contract and sale said prices fixed by said order are reasonably necessary for the stabilization of the milk industry by maintaining minimum prices necessary for the payment to milk producers as fixed in said order and a necessary operating margin to assure adequate distribution of milk to consumers.

In further answer to said paragraph the Commission
30 avers that any question of the reasonableness of said order must be raised by the respondent in a proceeding to have said order amended or revised, and no such proceeding has been brought or even intimated by the respondent.

27. The Commission denies the allegations of paragraph 27 of the answer to the citation, and in answer thereto avers that for the reasons hereinbefore set forth the respondent has violated the Milk Control Law of April 28, 1937, P. L. 417, and Official General Order No. A-6 of the Milk Control Commission as amended by Official General Order A-14, and that the application of the respondent for a license to do business as a milk dealer should be refused.

MILK CONTROL COMMISSION OF THE
COMMONWEALTH OF PENNSYLVANIA.
By: JOHN M. MCKEE, *Chairman.*

(Affidavit omitted.)

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31 Before the Milk Control Commission

Hearing before the Commission

Tuesday, March 18, 1941—4:00 p. m. (Continued from 10:00 o'clock.)

Offices of the Milk Control Commission, Third Floor, Telegraph Building, Harrisburg, Pennsylvania.

Commissioner: Hon. John J. Snyder, Member, Presiding.

Appearances: For the Milk Control Commission—Hon. Frank E. Coho, Deputy Attorney General. For the Defendant—Harris C. Arnold, Esquire. Owen P. Bricker, Esquire. For the Pennsylvania Milk Dealers' Association, Intervener—Willis F. Daniels, Esquire.

No witnesses were called. The evidence consisting of certain exhibits offered and received in evidence and statements by counsel, as shown by the record.

Hearing convened at 4:00 P. M., Tuesday, March 18, 1941, being continued from 10:00 o'clock a. m., same day.

Mr. DANIELS. I wish to enter my appearance for the
32 Pennsylvania Milk Dealers' Association as an intervener in support of the position that bids to the Federal Government, specifically referring to Indiantown Gap, should be according to the Milk Control Commission orders set out in the orders for milk so furnished.

Statement of counsel

Case opened for the Commonwealth by Mr. Coho.

Mr. COHO. This is a citation proceeding brought against Penn Dairies, Inc., of Lancaster, Pennsylvania, to show cause why its application for a license to do business as a milk dealer for the year May 1, 1941, to and including April 30, 1942, should not be refused or the granting thereof suspended. Penn Dairies, Inc., has made certain offers to sell and is actually selling certain milk at less than minimum prices fixed by the Milk Control Commission. These sales are made to the purchasing and contracting officer at Indiantown Gap, Pennsylvania, for use by the United States Army. Penn Dairies, Inc., contends that the Milk Control Commission has no authority to regulate minimum prices charged by milk dealers where the sales are made to a branch of the United States Government. The Milk Control Commission contends that its regulations apply to all milk dealers alike and who the customers of the milk dealers are is not material to Commission action.

As Commonwealth's Exhibit No. 1, I offer in evidence a copy of the citation, receipt of the original of which is acknowledged in a separate paper.

Mr. SNYDER. It will be received.

(Copy of citation notice received in evidence as Commonwealth's Exhibit No. 1.)

33 Mr. COHO. As Commonwealth's Exhibit No. 2, I offer in evidence the answer of Penn Dairies to the citation, including certain new matter.

Mr. SNYDER. It will be received.

(Answer to citation received in evidence as Commonwealth's Exhibit No. 2.)

Mr. COHO. As Commonwealth's Exhibit No. 3, I offer in evidence reply to the new matter contained in the answer of the respondent.

Mr. SNYDER. It will be received.

(Reply to new matter contained in answer of respondent received in evidence as Commonwealth's Exhibit No. 3.)

Mr. COHO. As Commonwealth's Exhibit No. 4, I offer in evidence the acceptance of service of the citation and of the answer to new matter, as well as consent that the hearing be held at this time.

Mr. SNYDER. It will be received.

(Acceptance of service and consent to time of hearing received in evidence as Commonwealth's Exhibit No. 4.)

Mr. COHO. Finally, as Commonwealth's Exhibit No. 5, I offer in evidence a stipulation containing certain factual matter, and two orders of the Milk Control Commission relevant to this hearing.

Mr. SNYDER. It will be received.

(Stipulation, with copies of Orders Nos. A-14 and A-6 received in evidence as Commonwealth's Exhibit No. 5.)

Mr. COHO. At this time I wish to call the attention of the Commission to the evidentiary matters averred on behalf of the defendant. The defendant attempts to show two things as a
30 defense to this action. It claims that although it offered to sell and in fact did sell milk at less than the minimum prices fixed by the Milk Control Commission it did so to an instrumentality of the Federal Government and therefore as to such offer and sale it is not subject to the regulation by the Milk Control Commission. Further it contends that the order in question in this case is of a nature that is not subject to the orders of the Milk Control Commission invoked here. The defendant contends that because a large quantity of milk is involved in the offer to sell and sale in this case that the order of the Commission is not applicable. It is our contention that in this matter to punish the defendant for violation of orders of the Commission any question as to the reasonableness of the order, except something unreasonable on the face of the order, cannot be questioned here.

I call to the attention of the Commission that Penn Dairies, Inc., has not filed with the Commission any request to have the minimum prices fixed in Official General Orders Nos. A-6 and A-14 reduced. Indeed, when this matter was called to the attention of Penn Dairies, Inc., prior to this hearing, Penn Dairies did nothing about petitioning the Commission for any such reduction.

Before writing your order, I request that the Commission review its files of papers requesting action on its General Orders fixing prices, so that the Commission can in its findings of fact set forth what, if any, action Penn Dairies has taken in requesting a reduction of the aforesaid minimum prices. In this particular proceeding only the Commission and Penn Dairies, Inc., are involved. In a proceeding to revise minimum prices, however, all interested
35 parties are invited to be heard so that it cannot be said that in this proceeding a binding determination could be made regarding the orders in effect.

All milk dealers have an opportunity to bid on various contracts. No particular dealer should be allowed to have the advantage of refusing to follow the minimum prices fixed by the Commission

on the ground that the contract in question may be slightly different from contracts actually in force elsewhere at the time of the bidding. When an order of the Commission is promulgated all contracts, actual and prospective, are taken into consideration.

Mr. Snyder. If there is nothing further, the hearing is adjourned.

Stipulation of facts

(Commonwealth's Exhibit No. 5)

It is agreed between counsel for the Pennsylvania Milk Control Commission, complainant, and counsel for Penn Dairies, Inc., respondent, in the above entitled proceeding, that the matters hereinafter set forth in paragraphs 1, 2, and 3 hereof and all admissions in respondent's answer to citation, shall be treated as admitted facts upon the hearing in said proceeding, and in all subsequent steps in or arising out of each of two citation proceedings both bearing the above caption, whether before said Commission or any Court

1. Official General Order No. A-14 amending Official General Order No. A-6 with respect to the State-Wide Milk Marketing Area issued by the Milk Control Commission of the Commonwealth of Pennsylvania, on June 23, 1937 to be effective on
36 and after July 1, 1937, is attached hereto, marked "Exhibit A" and made a part hereof.

2. The contract between respondent and the United States referred to at length in the citation in this case (hereinafter called "the contract") calls for the largest quantity of milk to be delivered by a single seller to a single purchaser, or for delivery in quantity lots, known to the respondent or to the Commission.

3. No contract or delivery of milk comparable in size, or in circumstances of bottling and delivery, has heretofore been made in Pennsylvania.

It is further agreed that the statements in the following paragraphs shall be received in evidence as competent testimony on behalf of the respondent at the hearing in said proceedings and shall be considered as evidence of the respondent in all subsequent steps in or arising out of the above entitled proceedings, whether before said commission or any Court.

4. The Respondent's average bottle breakage and losses are one per cent. (1%) under said contract, and are three per cent. (3%) under ordinary sales conditions, the bottles under said contract being in more responsible hands, and are not scattered over large areas. The respondent's average bottle breakage and losses where milk is served under ordinary sales conditions is $0.00162 per quart bottle, and $0.00075 per half pint bottle. Under the said contract respondent's average bottle breakages and losses are $0.00054

per quart bottle and $0.00025 per half pint bottle—the breakage and losses being approximately three per cent. (3%) under ordinary sales conditions and one per cent. (1%) under said
37 contract. Therefore, by reason of those factors allowance should be made in calculating respondent's costs.

5. By reason of the large quantity of milk being delivered at one time to one place, a few trucks and drivers can handle the respondent's deliveries under this contract. Under ordinary circumstances delivery of the same quantity of milk would require a large number of trucks and drivers. The respondent's cost of delivering each bottle of milk under this contract (whether a quart or a half pint) is $0.0005 less than respondent's costs for delivery of bottled milk in ordinary sales. Therefore an allowance should be made by reason of that factor in calculating respondent's cost.

6. The cost to respondent of bottling a quart of milk, which includes the bottle washing and all various processes and plant operation, is $0.0045, and the cost of bottling a half pint is $0.00125.

7. The respondent's cost of the cap which is placed upon each bottle is $0.00125.

8. The profit which respondent would realize from the sale of the quantities covered by said contract, if sold at prices fixed by said order, would be a profit materially in excess of any margin of profit necessary to maintain stability in the milk industry.

9. The margin of profit which the respondent will realize under the said contract is adequate for respondent's purposes and to maintain stability in the industry.

FRANK E. COLD,
Attorney for Complainant.
ARNOLD & BRICKER,
By HARRIS C. ARNOLD,
Attorney for Respondent.

38 *Exhibit "A" to stipulation of facts.*

Official General Order A-14

Commonwealth of Pennsylvania Milk Control Commission

OFFICIAL GENERAL ORDER NO. A-14

JUNE 23, 1937.

Amending Official General Order No. A-6; With Respect to the State-Wide Milk Marketing Area

By virtue of the authority vested in the Milk Control Commission of the Commonwealth of Pennsylvania by Act No. 105,

approved April 28, 1937, it is hereby ordered that Official General Order No. A-6 as heretofore issued by the Milk Control Commission be amended by this order, to be known as Official General Order No. A-14, effective July 1, 1937, at 12:01 a. m. This Order shall, and does hereby, amend said Official General Order No. A-6 with respect to Section 2; Section 3; Section 4, Paragraphs (a), (b), and (c); Section 5, Paragraph (b), (c, c-1) and (d); Section 7; and said Official General Order No. A-6 as amended hereby shall read as follows:

SECTION 1. Territorial Scope.—This Official General Order shall apply to the production, marketing and distribution of milk and designated milk products within the Commonwealth of Pennsylvania for Area 11, as hereinafter defined.

SECTION 2. Definitions.—As used in this Official General Order the following terms shall have the following meanings:

Area Number Eleven—State-Wide Milk Marketing Area—Consists of all areas in the Commonwealth of Pennsylvania which are not included in Areas One, Two, Three, Four, Five, Six, Seven, Eight, Mine, and Ten.

In the event that this Milk Marketing Area should overlap any other Milk Marketing Area in this state in such a manner as to cause conflict in prices, the higher price shall prevail.

New York Butter—Means the average price per pound of 92 score butter at wholesale in the New York Market, as reported by the United States Department of Agriculture for the month during which the milk is purchased.

Class 1 Milk—Includes all milk purchased, received or handled by a milk dealer and so marketed or disposed of as to be readily open to the supposition that it will find its ordinary utilization by human consumption as raw or pasteurized milk, homogenized milk, chocolate or other flavored milk, milk drink, or flavored drink. It includes all fluid milk purchased from a producer by a milk dealer and sold in fluid form by such milk dealer in bottles, and all milk sold by such milk dealer in bulk to stores, bakeries, hotels, restaurants, hospitals, schools, and institutions, irrespective of the use to which the purchaser from such milk dealer puts such milk. It also includes all milk received at a milk plant or receiving station in fluid form, in the absence of clear evidence that such milk is so accounted for as to fall into some other class.

Class 1A Milk—Includes all milk from which is derived sweet or sour cream to be sold for human consumption as sweet or sour cream.

Class 2 Milk—Includes all milk which is utilized, sold, distributed or disposed of other than as Class 1, Class 1A, or class 3 Milk.

Class 3 Milk—Includes all milk which is manufactured into butter, except, however, that milk manufactured into butter utilized in ice cream or other dairy products shall be included in Class 2 Milk.

The above classifications (Class 1, Class 1A, Class 2, and Class 3) shall apply to Milk Marketing Area 11: Provided, however, that in said Area, Class 2 milk as above defined may be subject to the following exceptions:

Class 4 Milk—Includes all milk utilized in the manufacture of milk chocolate, candy and confectioneries.

Class 5 Milk—Includes all milk utilized in the manufacture of Farmer's Pressed Cheese and Cream Cheese.

Class 6 Milk—Includes all milk utilized in the manufacture of American Cheese.

Skim Milk—Includes whole milk from which the cream has been separated and which does not contain more than one-half of one percent butterfat.

Unless otherwise clearly indicated herein, all terms in
41 this Official General Order shall have the meanings ascribed to them in Act No. 105, approved April 28, 1937.

SECTION 3. Minimum Prices to Producers.—The following shall be the minimum prices paid to producers or to a group of producers per hundred pounds of milk sold to milk dealers to be resold in Milk Marketing Area 11:

Class 1 Milk—$2.58.

Class 1A Milk—$2.20.

Class 2 Milk—Four times New York Butter, plus 20% of this amount, plus $0.15.

Class 3 Milk—Butterfat content of milk in pounds, multiplied by New York Butter, plus 10¢.

Milk purchased by milk dealers from producers or a group of producers to be manufactured into the specific products named in Classes 4, 5, and 6, at plants engaged in the manufacture of such products, shall be paid for in accordance with the classification of utilizing as defined for those particular classes. In the event that any such dealer manufactures or separates milk into any product not specifically named in Classes 4, 5, or 6, he shall pay for such milk upon the actual utilization as defined in Classes 1, 1A, 2, or 3.

Class 4 Milk—Four times New York Butter, plus 20% of this amount, plus $0.15 subject to the following premiums: A sanitation premium of $0.10 per hundred pounds shall be paid in the case of any producer whose stable, milkhouse and method of producing and handling milk meet the requirements of the Department of Health of the Commonwealth of Pennsylvania.

42 In addition, a production premium of $0.10 per hundred

pounds shall be paid to any producer whose average daily production equals or exceeds 1,000 pounds for the period covered by such payment. When the average daily production of such producer falls below 1,000 pounds, but not less than 500 pounds, the premium of $0.10 per hundred pounds may be reduced by $0.01 for each one hundred pounds of milk below 1,000 pounds. When the average daily production falls below 500 pounds no production premium shall be paid.

The above minimum prices for this Area shall be f. o. b. milk dealer's processing, bottling and/or manufacturing plant located nearest the producer's farm for milk of 4.0% butterfat content. With respect to milk in Classes 1, 1A, 2, and 4, there shall also be a butterfat differential of at least $0.02 per hundred pounds for each one-half of one-tenth percent added for milk testing above 4.0% butterfat content; and not more than $0.02 for each one-half of one-tenth percent butterfat shall be deducted for milk testing below 4.0% butterfat content.

The above prices for Class 4 Milk shall be f. o. b. manufacturing plant, however, if the milk is delivered to a branch station rather than the manufacturing plant, a maximum of $0.05 per hundred pounds may be deducted from the above price.

Class 5 Milk—Butterfat content of milk in pounds, multiplied by New York Butter, plus 10¢.

Class 6 Milk—For the month during which the milk is handled, the average of the weekly quotations per pounds of cheese with differentials as indicated at the following markets, or with differentials as indicated from such of these markets
43 as may issue quotations during the periods: Single Daisies at Wisconsin Cheese Exchange, Plymouth, Wisconsin, plus $0.01 per pound; Twins at Gouverneur Cheese Board, Gouverneur, New York; Flats at Cuba Board of Trade, Cuba, New York. From the average price of cheese as determined from these quotations and differentials may be deducted $0.02 per pound of cheese allowance for making, and the price per 100 pounds of milk shall be computed according to the yield of cheese per 100 pounds of milk as follows:

B. F. Test	Cheese Yield	B. F. Test	Cheese Yield	B. F. Test	Cheese Yield
3.0%	8.30	3.9%	10.37	4.8%	12.44
3.1%	8.53	4.0%	10.60	4.9%	12.67
3.2%	8.76	4.1%	10.83	5.0%	12.90
3.3%	8.99	4.2%	11.06	5.1%	13.13
3.4%	9.22	4.3%	11.29	5.2%	13.36
3.5%	9.45	4.4%	11.52	5.3%	13.59
3.6%	9.68	4.5%	11.75	5.4%	13.82
3.7%	9.91	4.6%	11.98	5.5%	14.05
3.8%	10.14	4.7%	12.21		

The above minimum prices for Classes 5 and 6 milk shall be f. o. b. milk dealer's country receiving station or manufacturing plant nearest the producer's farm. If the milk dealer has no country receiving-station or manufacturing plant, then the prices shall be f. o. b. loading platform or shipping point nearest the producer's farm; in each case, the milk dealer shall pay the cost of transportation from such loading platform or shipping point to the destination.

44 SECTION 4. Minimum Retail and Wholesale Fluid Milk, Skim Milk, Buttermilk, Flavored Milk, and Milk Drink Prices.—The following shall be the minimum Retail and Wholesale prices charged by or paid to milk dealers for fluid milk, skim milk, buttermilk, flavored milk and milk drink sold in bottles or other containers in Area 11:

(a) Minimum Retail Prices.—Milk dealers, including stores, to consumers, except for consumption on premises where sold:

Product	Unit price		
	Quart	Pint	Half-pint
Grade "A" Milk	$0.13	$0.07	$0.05
Grade "B" Milk:			
Exceeding 4.0% B. F	.12	.07	.05
Not exceeding 4.0% B. F	.11	.06	.05
Cream Buttermilk, Chocolate Milk, and other flavored Milk or Milk Drink containing more than 0.5% Butterfat	Same as Grade "B" Milk Exceeding 4.0% Butterfat.		
Skim Milk	.08		
Buttermilk—Plain	.09	.06	

(One Gallon, Single Container, Single Delivery $0.30).

Any producer-distributor who distributes only milk which is produced entirely from his own herd may sell at the minimum prices quoted above irrespective of butterfat content. This provision shall not apply to cooperative producer associations selling milk directly to the consumer.

45 Minimum Retail Prices for Fluid Milk Sold at Farm In Consumers' Containers.—Any producer may sell at the farm, milk produced from his own herd and supplied in the purchaser's container, at $0.02 per quart below the minimum retail price fixed by this Order for Area 11.

(b) Minimum Wholesale Prices.—Milk dealers to other milk dealers and to stores for resale; and to bakeries, hotels, restaurants, hospitals and institutions for consumption on the premises:

Product	Unit price		
	Quart	Pint	Half-pint
Grade "A" Milk	$0.115	$0.06	$0.035
Grade "B" Milk:			
Exceeding 4.0% B. F	.105	.06	.035
Not exceeding 4.0% B. F	.095	.05	.035
Grade "B" Milk to Schools Not exceeding 4.0% B. F			.0275
Cream Buttermilk, Chocolate Milk and other flavored Milk or Milk Drink containing more than 0.5% Butterfat	(Same as Grade "B" Milk Exceeding 4.0% Butterfat.		
Skim Milk	.06		
Buttermilk—Plain	.07	.05	.03

(One Gallon, Single Container, Single Delivery, $0.25.)

The above prices To Schools include service charges for ice, straws, or special boxes. If these services are not rendered, the above prices may be reduced by $0.0025 per half-pint.

(c) Minimum Wholesale Prices.—Milk dealers to sub-dealers:

Product	Unit price		
	Quart	Pint	Half-pint
Grade "A" Milk	$0.0975	$0.055	$0.035
Grade "B" Milk:			
Exceeding 4.0% B. F	.0875	.055	.04
Not exceeding 4.0% B. F	.0775	.045	.03
Cream Buttermilk, Chocolate Milk and other flavored Milk or Milk Drink containing more than 0.5% Butterfat	(Same as Grade "B" Milk Exceeding 4.0% Butterfat.		
Skim Milk	.05		
Buttermilk—Plain	.06		

(One Gallon, Single Container, Single Delivery, $0.20.)

(d) Bulk Prices.—The following shall be the minimum Wholesale prices charged by or paid to milk dealers for fluid milk sold, In Bulk, to other milk dealers, including stores, bakeries, hotels, restaurants, schools, hospitals; and institutions, irrespective of the use to which they put such milk:

Quantity of the average daily delivery during month	Grade "A" milk	Grade "B" milk not exceeding 4.0% butterfat	Buttermilk	Skim milk for human consumption
	Price per quart			
Less than 10 quarts	Same as minimum wholesale bottled quart prices.			
10 to 39 quarts	$0.11	$0.085	$0.06	
40 to 199 quarts	.1075	.0825	.05	$0.04
200 to 599 quarts	.105	.08	.05	.02
600 to 999 quarts		.08	.05	.02
1,000 to 1,499 quarts		.08	.05	.02
1,500 quarts or over		.07	.05	.02

47 The Wholesale Bulk price for Chocolate Milk, Other Flavored Milk, Chocolate Drink or Other Flavored Milk Drink, or Cream Buttermilk, shall be the same as the above prices for milk.

The prices for Milk testing over 4.0% Butterfat shall be determined by adding $0.005 per Quart to the above prices.

Average Daily Delivery.—The average daily delivery during the month shall be computed by determining the number of days upon which deliveries are actually made under the terms of the sale, and dividing the total volume of milk delivered during the month by the number of such days.

SECTION 5. Minimum Retail and Wholesale Fluid Cream and Ice Cream Mix Prices:

The following shall be the minimum Retail and Wholesale prices charged by or paid to milk dealers for fluid cream sold in bottles or other containers and the minimum Wholesale prices charged by or paid to milk dealers for fluid cream and ice cream mix sold in bulk in Area 11:

(a) Minimum Retail Prices for Fluid Cream Sold In Bottles.—Milk dealers, including stores, to consumers, except for consumption on premises where sold:

Unit containers	Grade of cream (sweet or sour)		
	Light	Medium	Heavy
Quarts	$0.48	$0.63	$0.80
Pints	.26	.36	.46
Half-pints	.15	.20	.26
Quarter-pints	.10	.12	.15

48 (b) Minimum Wholesale Prices for Fluid Cream Sold In Bottles.—Milk dealers to any other milk dealers, including stores, hotels, restaurants, schools, hospitals and institutions:

Unit containers	Grade of cream (sweet or sour)		
	Light	Medium	Heavy
Quarts	$0.42	$0.56	$0.72
Pints	.23	.32	.41
Half-pints	.13	.17	.22
Quarter-pints	.09	.11	.13

(c) Minimum Wholesale Prices for Fluid Cream Sold In Bulk:

(c-1) Milk dealers to stores, hotels, restaurants, schools, hospitals, and institutions:

Quantity of the average daily delivery during month (quarts)	Grade of cream (sweet or sour)		
	Light	Medium	Heavy
1 to 10 price per quart	$0.42	$0.56	$0.72
10 to 39 price per quart	.36	.50	.63
40 to 199 price per quart	.34	.47	.59
200 to 399 price per quart	.33	.45	.56
400 to 599 price per quart	.32	.44	.55
600 or over price per quart	.31	.43	.55

Average Daily Delivery.—The average daily delivery during the month shall be computed by determining the number of days upon which deliveries are actually made under the terms of the sale, and dividing the total volume of milk delivered during the month by the number of such days.

(c-2) Milk dealers to milk dealers other than specified in paragraph c-1 of this Section:

For quantity of a single delivery	Grade of cream (sweet or sour)		
	Light	Medium	Heavy
1 to 4 cans per can of 40 quarts	$10.00	$14.00	$17.00

The cream prices set forth in paragraph c-1 of this Section are based upon New York Butter at $0.3525 per pound. For each $0.025 per pound increase or decrease in the New York Butter price above or below said price of $0.3525 per pound, these cream prices shall be increased or decreased accordingly on the basis of $0.01 per quart for Light Cream; $0.015 per quart for Medium Cream; and $0.02 per quart for Heavy Cream.

As used in this Official General Order, the term "Light Cream" means cream containing 20% butterfat; the term "Medium Cream" means cream containing 30% butterfat; and the term "Heavy Cream" means cream containing 40% butterfat. Any cream containing a greater percentage of butterfat shall be sold at minimum prices correspondingly greater than those fixed for the respective grades under this Section.

(d) Minimum Wholesale Prices for Ice Cream Mix (14% Butterfat; 38%-40% Total Solids) Sold In Bulk.—Milk dealers to any other milk dealers, including stores, hotels, restaurants, schools, hospitals and institutions:

FOR QUANTITY OF A SINGLE DELIVERY

Less than 10 gallons.....$1.05 per gallon
1 to 4 cans—Per can of 40 quarts..... 9.00 per can

50 There shall be a Butterfat Differential of $0.30 per can ($0.03 per gallon) added to the above prices for Ice Cream Mix for each 1% butterfat above 14%, and deducted for each 1% butterfat below 14%.

These prices are based upon New York Butter at $0.35 per pound. For each $0.01 per pound increase or decrease in the New York Butter price above or below said price of $0.55 per pound, these prices shall be increased or decreased accordingly on the basis of $0.13 per can ($0.013 per gallon) for 14% Butterfat Mix.

Application shall be made to the Commission for resale prices upon all grades of milk for which a price is not herein specifically prescribed.

SECTION 6. Constitutional Construction.—It is hereby declared to be the intention of the Commission that if this Order cannot take effect in its entirety because of the decision of any court holding illegal or unconstitutional any part hereof, the remaining provisions of the Order shall be given full force and effect as completely as if the part held illegal or unconstitutional had not been included herein, provided always that the parts held illegal or unconstitutional would not automatically void any other parts.

SECTION 7. Effective Date of This Order.—All milk delivered on and after June 2, 1937, shall be paid for at the prices prescribed in, and shall be otherwise governed by, Official General Order No. A–6; except, however, that the particular prices and provisions of this Order which amend Official General Order No. A–6 shall govern all milk delivered on and after July 1, 1937.

51 Milk delivered upon dates prior to June 2, 1937, shall be governed by the orders effective upon such dates.

PENNSYLVANIA MILK CONTROL COMMISSION,
HOWARD G. EISAMAN,
Chairman.
JOHN J. SNYDER,
ROBT. E. PATTISON, Jr.

Approved—The 24th day of June 1937.

GEORGE H. EARLE, *Governor.*

NOTE.—Official General Order No. A–6 which the foregoing order amended has no additional bearing on the case and therefore is not printed.

494093—42——3

Pennsylvania permit to United States for use of Indiantown Gap Military Reservation

(Commonwealth's Exhibit Offered and Admitted by Agreement in Court of Common Pleas.)

HARRISBURG, PENNSYLVANIA,
September 30, 1941.

The Commonwealth of Pennsylvania, by the Department of Property and Supplies, as Agent for the Department of Military Affairs, hereby gives permission for the United States, its troops, and troops of the National Guard being inducted into the Federal service, and their animals, vehicles, and equipment, at any and all times during the period commencing on or about September 30, 1940, and continuing for one (1) year, as under existing
52 Pennsylvania laws, this privilege cannot be granted for a period of more than one (1) year, temporarily, to enter, maneuver upon, pass over, and bivouac or camp upon the following-described premises and to use the water therein or thereon for drinking, cooking, and cleaning purposes, and the use of all existing facilities and for such additional construction as may be necessary to house and train such National Guard units as may be inducted into the Federal service. Such additional construction placed upon the said premises shall be and remain the property of the Government and may be removed therefrom by the Government prior to the termination of this permit, or lease if and when executed. It is understood that legislation is to be introduced in the Legislature granting the right to the Commonwealth to make a lease for such further time as may be mutually agreed upon by the parties. The said premises are described as follows:

Indiantown Gap Reservation, Indiantown Gap, Pennsylvania, consisting of 4,975 acres in East Hanover Township, Dauphin County, Pennsylvania, and 7,673¼ acres in Union and East Hanover Townships, Lebanon County, Pennsylvania, totalling approximately 12,638¼ acres.

This permit, for the above-described premises, is granted subject to the following reservations and exceptions:

a. (1) Dwelling houses now on the Reservation and hereafter to be erected by the Commonwealth of Pennsylvania, on the Reservation, to be used for the housing of employees of the Commonwealth of Pennsylvania who shall be subject to such rules and regulations as the Commanding Officer of the Can-
53 tonment or other competent military authority, may from time to time prescribe.

(2) Certain warehouses and barns on the Reservation now erected (Buildings Nos. D–1, 22, 1121, 1116, 1059, 1112, W–1, V–1,

X–2, U–1, 651, BB–1, AA–1, S–1, R–1, 1106, T–2, 1083, 1005, 1006, 1007, 1008A, 1008B, 1009, 1011, 1012, 1013, 1014, 1015, 1016, 1017, and 1018), or hereafter to be erected, to be used by the Commonwealth and as shall be mutually agreed to between the Commonwealth and the Federal Government.

b. The right to train an organization that may be organized to take the place of the Pennsylvania National Guard when it is in the field; also the Pennsylvania Motor Police. This training subject to mutual agreement between the Federal Government and the Commonwealth of Pennsylvania.

c. The right to erect and use an office building by the Commonwealth of Pennsylvania on the Reservation.

If desired by Commonwealth authorities, utility services such as electric light and power, heat, water, etc., will be furnished upon a reimbursement basis, by the Federal Government to dwellings and other buildings on the Indiantown Gap Reservation which have been exempted from War Department control by this permit, or to such buildings that may be hereafter erected by the Commonwealth of Pennsylvania on the Reservation. The cost of furnishing these services, as determined by the Commanding Officer of the Cantonment, will be reimbursed to the War Department either by the Commonwealth of Pennsylvania or the occupants of the dwellings.

34 It is understood that any claim for damage arising out of the use of said property under this permit shall be in writing, under oath, and shall contain a detailed statement of the condition of the premises, enumerating the loss or damage alleged and the estimated amount. Such claim shall be filed in triplicate within 240 hours after the termination of the use herein granted, with _____, Rents, and Claims Officer at _____, for adjustment or for settlement as provided by law and regulations.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PROPERTY AND SUPPLIES.
By ROGER W. ROWLAND, *Secretary of the Department of Property and Supplies, as Agent for the Department of Military Affairs.*

Witness: Louise Lynn.

Now, Feb. 21, 1941, the above temporary permit is approved.

ARTHUR H. JAMES, *Governor.*

Approved as to form.

ROBERT E. SCRAGG,
Deputy Attorney General.

55 **Before the Milk Control Commission**

Findings of fact

March 25, 1941

On March 5, 1941, a citation was directed against the respondent, Penn Dairies, Inc., requiring it to show cause why its application for a milk dealer's license for the year May 1, 1941 to April 30, 1942, inclusive, should not be refused for offering to sell and selling milk at less than minimum prices fixed by the Milk Control Commission. The alleged offer and sale were to the purchasing and contracting officer at Indiantown Gap, Pennsylvania, a United States Military Reservation. The respondent filed an answer to the citation, admitting the material allegations of the citation, but claiming that the offer and sale were not in violation of the Milk Control Law for two reasons: (1) that the offer and sale having been made to the United States, the respondent did not have to observe the orders of the Pennsylvania Milk Control Commission, and (2) that the order was not applicable to this transaction because the minimum price was too high. A hearing was held before the Milk Control Commission on March 18, 1941, at which time certain testimony was received.

From the pleadings and testimony before it, the Milk Control Commission makes the following findings of fact:

1. The defendant, Penn Dairies, Inc., is a corporation organized under the laws of the Commonwealth of Pennsylvania, doing business as a milk dealer in several parts of the Commonwealth of Pennsylvania and having its principal place of business in Lancaster, Pennsylvania, at 572 North Queen Street, and at 623 Second Street.

56 2. The defendant, Penn Dairies, Inc., has applied to the Milk Control Commission of Pennsylvania for a milk dealer's license for the year May 1, 1941, to April 30, 1942, inclusive.

3. On or about February 1, 1941, the purchasing and contracting officer of the Quartermaster at Indiantown Gap, Pennsylvania, sent to the defendant Penn Dairies, Inc., at Lancaster, Pennsylvania, a standard government form of invitation for bids, Form No. 30, Invitation No. QM 517-41-14, accompanied by standard government form of bid No. 31, and standard government form of continuance, Schedule No. 36.

4. Said standard form No. 30 as issued by the purchasing and contracting officer read as follows:

"STANDARD GOVERNMENT FORM OF INVITATION FOR BIDS

(Supply Contract)

Invitation No. QM 517-41-14

February 1, 1941.

"Sealed bids in triplicate will be received in this office until the date and hour named in the accompanying schedules and then publicly opened, for furnishing the materials and supplies called for therein.

"Bids must be submitted upon the Standard Government Form of Bid (Standard Form No. 31), and in accordance with the Standard Government Instructions to Bidders (Standard Form No. 22) and any special instructions supplementary thereto.

"Envelopes containing bids must be sealed and marked
57 on the upper left-hand corner with the name and address of the bidder and the date and hour of opening, and addressed to the purchasing agency named below:

"PURCHASING AND CONTRACTING OFFICER,
Office of the Quartermaster,
Indiantown Gap, Pennsylvania.

"Marked: Bid for Milk, Buttermilk, and Ice Cream. March 1 to June 30, 1941, requirements.

"To be opened: 10:00 a. m. Eastern Standard Time, February 15, 1941.

"Special purchase conditions, attached to said invitation for bids, provided, in part, as follows:

"1. *General.*—Bids are invited for supplies as specified in this invitation, all or any part thereof, to be delivered as specified, all transportations, switching or drayage charges to be prepaid by the contractor and supplies to be subject to final inspection and acceptance at destination.

"23. • • •

"*Milk, Bread & Ice Cream.*—Deliveries of Milk, Bread, and Ice Cream will be made daily to Military Organization Barracks, Indiantown Gap, Pa., on days called for by the Quartermaster, or his authorized representative, and at such time as directed. It is understood and agreed that the milk bottles and all containers shall remain the property of the contractors and every possible precaution will be maintained to preserve same in the original
58 state, but in the event of damage to these articles while in the possession of the Government, the Government will not be held responsible for such damages, as the purchase in question is a purchase of contents only."

5. Thereafter and prior to 10:00 a. m., Eastern Standard Time, February 15, 1941, Penn Dairies, Inc., in accordance with said invitation for bids, offered by writing delivered to said purchasing and contracting officer, to sell to the purchasing and contracting officer in the office of the Quartermaster, Indiantown Gap, Pennsylvania, 135,000 one-quart bottles of fresh pasteurized milk at $0.079 per bottle, and 540,000 half-pint bottles of fresh pasteurized milk at $0.0215 per bottle. The schedule for bid and the defendant's bid described 135,000 quarts of fresh milk and the 540,000 half pints of fresh milk as items Nos. 1 and 3 respectively, in said bid, the respective descriptions in said invitation and bid reading as follows:

"Item No. 1—Milk, Fresh, Grade A, Pasteurized, 1 Qt. Bottles, W Sanitary Protective Type Caps. Type 11 C–M–381B 135,000 Btl.

"Item No. 3—Milk, Fresh, Grade A, Pasteurized, ½ Pt. Bottles, W Sanitary Protective Type Caps. Type 11 C–M–381B 540,000 Btl."

6. Indiantown Gap, a United States Military Reservation, is an institution of the United States for military training, situate in the northwestern part of Lebanon County between state highway route No. 443 and State highway route No. 343, in the State of Pennsylvania, and is situate in Area No. 11 of Pennsylvania, as designated by the Milk Control Commission of Pennsylvania, being the State-Wide Milk Marketing Area.

59 7. Minimum wholesale prices to be charged by milk dealers for milk sold in bottles or other containers in Area No. 11, the State-Wide Milk Marketing Area, are established by Official General Order No. A–6 of the Milk Control Commission, as amended by Official General Order No. A–14, in Section 4, Subdivision (b).

8. Grade A pasteurized milk, as described in the aforesaid invitation to bid, is equivalent to Grade B milk as described in Official General Orders Nos. A–6 and A–14 of the Milk Control Commission and other price-fixing orders of the Commission. The part of Section 4 (b) of Official General Order No. A–14, amending and superseding that portion of Official General Order No. A–6 that applies to the present case reads as follows:

"(b) Minimum Wholesale Prices.—Milk dealers to other milk dealers and to stores for resale; and to bakeries, hotels, restaurants, hospitals, and institutions for consumption on the premises:

Product—Grade "A" milk; grade "B" milk	Unit price		
	Quart	Pint	Half-pint
Exceeding 4% B. F.	$0.115	$0.06	$0.035
Not exceeding 4% B. F.	.105	.06	.035
Grade "B" milk to schools, not exceeding 4% B. F.	.095	.05	.035
			.0275

The above price to schools include service charges for
60 ice, straws, or special boxes. If these services are not rendered, the above prices may be reduced by $0.0025 per half-pint.

9. The Milk Control Commission has treated Indiantown Gap Military Reservation as an educational institution or school thereby allowing the benefit of an interpretation of such official general orders Nos. A-6 and A-14 favorable to the application of the lowest minimum prices possible for milk sold to Indiantown Gap Military Reservation, and announced to all known interested parties, including the defendant, Penn Dairies, Inc., that the minimum prices to be charged by milk dealers for fresh pasteurized milk in half pints sold to the purchasing and contracting officer at Indiantown Gap shall be $0.025 per half pint of milk where Grade B milk as described in said official general orders is furnished and there are no special services of ice, straws or special boxes.

10. On February 15, 1941, at 10:00 o'clock a. m., Eastern Standard Time, the aforesaid bid of the defendant Penn Dairies, Inc., as well as other bids submitted, were opened by the purchasing and contracting officer in the office of the Quartermaster, Indiantown Gap, Pennsylvania, and thereafter the offer of the defendant, Penn Dairies, Inc., to sell 135,000 quarts of fresh pasteurized milk and 540,000 half pints of fresh pasteurized milk, as hereinbefore stated, was accepted and a contract thus entered into.

11. The defendant, Penn Dairies, Inc., in accordance with the said offer to sell and contract for, has delivered milk to several mess halls and other places at said Indiantown Gap Military Reservation.

61 12. The milk so delivered was received from milk producers in and near Lancaster County, Pennsylvania, by defendant, Penn Dairies, Inc., at its place of business at 623 Second Street, Lancaster, Pennsylvania, where it was weighed, tested, processed, bottled, capped, crated, and loaded on trucks of

the defendant for delivery by employees of the defendant to said Indiantown Gap Military Reservation.

13. The prices at which the defendant, Penn Dairies, Inc., offered to sell and did sell milk to the purchasing and contracting officer at the office of the Quartermaster, Indiantown Gap, Pennsylvania, were $0.079 instead of $0.095 for quarts of fresh pasteurized milk in quart bottles, and $0.0215 instead of $0.025 for half pints, as respectively provided in subdivision B of Section 4 of Official General Order A-6, as amended by Official General Order A-14, and therefore said offer to sell and the sales thereof are in violation of Section 807 of the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j, and the application for Penn Dairies, Inc., for a milk dealer's license for the year May 1, 1941, to and including April 30, 1942, should be refused under Section 404 (10) of the Milk Control Law.

14. The Milk Control Commission finds that the testimony on behalf of the respondent does not show that Official General Order No. A-6, as amended by Official General Order No. A-14, is inapplicable to the facts of this case or invalid.

15. The respondent, Penn Dairies, Inc., did not prior to the issuance of this citation and has not since then filed with the Milk Control Commission any request for any amendment or revision to Official General Order No. A-6, as amended
62 by Official General Order No. A-14. The Milk Control Commission has not received any such request from any other milk dealer affected by said orders.

DISCUSSION

The first legal proposition submitted to the Commission by the respondent is that because it sells milk under the contract in question to an instrumentality of the United States, the orders of the Milk Control Commission are not applicable. This contention cannot be sustained.

In the case of Commonwealth v. Rohrer, 37 D. & C. 410, 421, in an opinion by Judge Schaeffer, the Court of Quarter Sessions of Lancaster County held that a milk dealer who sells milk to the United States Veterans Hospital must do so at the minimum prices prescribed by the Commission. The facts in that case were almost identical in the present case before the Commission. There appear to be only two other cases directly in point. These are Patterson Milk and Cream Company, Inc., v. Milk Control Board, 118 N. J. L. 383, 192 Atl. 838, and Milk Control Board v. Gosselin's Dairy, Inc., 16 N. E. (2d) 641, 644 (Mass. 1938). The law is so well discussed in the opinion by Judge Schaeffer that no further discussion will be made here. It is sufficient to

say that the regulations of the Milk Control Commission are an exercise of the police power to which the respondent milk dealer is subject. There is no attempt by the Commission to regulate the actions of United States officers upon United States territory.

The second legal defense that the respondent interposes is that the order of the Milk Control Commission in this particular case is not reasonable.

63 The respondent milk dealer has not requested a hearing pursuant to Article VIII of the Milk Control Law for the purpose of revising Official General Order No. A-6, as amended by Official General Order No. A-14. The present hearing is one concerning only the Milk Control Commission and the respondent dealer. A hearing to revise or amend a price order is one in which all interested parties are entitled to due notice. It would be manifestly unfair for the Milk Control Commission to say without allowing other interested parties to be heard, that this particular order is unreasonably high. The respondent cannot disregard an order of the Milk Control Commission and attempt to bring out facts that show unreasonableness of the order in a proceeding of this kind. This can only be done by an appeal from the price order itself or by petition to have a price order amended or revised.

Those milk dealers who rely upon the validity of a price order and govern their bids and sales accordingly would be the victims of uncertainty if the respondent were able to disregard the orders of the Commission and acquire a contract at other than lawful prices by reason of alleged unreasonablenes of the orders.

The Superior Court of Pennsylvania so held in the case of Commonwealth v. Ziegler Dairy Company, 139 Pa. Superior Ct. 224, 11 Atl. (2d) 669, in which President Judge Keller discussed this matter fully.

64 Before the Milk Control Commission

Order of the Commission

March 25, 1941

And now, this 25th day of March A. D. 1941, the application of Penn Dairies, Inc., Lancaster, Pennsylvania, the respondent herein, for a milk dealer's license for the year May 1, 1941, to April 30, 1942, inclusive, is refused for the reasons above stated.

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,
JOHN M. McKEE, *Chairman*,
JOHN J. SNYDER, *Member*.

In the Court of Common Pleas of Lancaster County

Appeal petition

April 7, 1941

To the Honorable the Judges of said Court:

Penn Dairies, Inc., a Pennsylvania Corporation aggrieved by a special order of the Milk Control Commission directed against it, brings this its appeal therefrom and respectfully represents.

1. That Penn Dairies, Inc. (hereinafter called the appellant) is a corporation incorporated under the laws of the Commonwealth of Pennsylvania and has its office and principal place of business at the corner of North Queen and Frederick Streets in the City of Lancaster, Pa.

2. That Penn Dairies, Inc. is engaged in the milk business in the Commonwealth of Pennsylvania, and has been so engaged for many years. It has large amounts invested in plant, and equipment, and it purchases milk from many producers, supplies many consumers, and employs many persons in said business.

65

3. That appellant has been the holder of and has operated under milk dealer's licenses issued by the Milk Control Commission of the Commonwealth of Pennsylvania at all times since such licenses have been required by law.

4. That on February 18, 1941 the Milk Control Commission of the Commonwealth of Pennsylvania (hereinafter called the Commission), issued a citation against appellant to show cause why appellant's license as a milk dealer for the year May 1, 1941 to April 30, 1942 should not be refused for offering to sell and selling milk to the United States government at less than the minimum prices fixed by the Commission for general sales of milk.

5. Appellant filed an answer to said citation, to which the Commission replied. A hearing was held before the Commission on March 18, 1941 on citation, answer, reply and stipulated evidence.

6. That on March 24, 1941, the Commission issued the following order in said proceeding:

"And now, this 24th day of March, A. D. 1941, the application of Penn Dairies, Inc., Lancaster, Pennsylvania, the respondent herein, for a milk dealer's license for the year May 1, 1941, to April 30, 1942, inclusive, is refused for the reasons above stated."

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Said order was accompanied by an opinion, findings, and discussion, a copy of which is hereto attached, made a part hereof, and marked Exhibit A.

7. That said order is erroneous, and the Commission erred in entering it, for the reasons hereinafter set forth, to wit:

8. The said order is unconstitutional and void and beyond the jurisdiction of the Commission, in that it attempts to interfere with and regulate a contract between appellant and the United States and to prevent performance of said contract, or to penalize appellant for making and performing it.

9. The said order is an unlawful and unconstitutional interference with the raising and supporting of the armed forces of the United States.

10. The said order violates Article I, Section 8 of the Constitution of the United States.

11. The said order would prevent appellant from carrying on its lawfully established business, and would deprive it of its property and the use thereof without due process of law and contrary to the law of the land, in violation of Amendment XIV of the Constitution of the United States, Article I, Sections 1 and 9 of the Constitution of Pennsylvania.

12. The Commission erred in concluding that the actions of appellant complained of in said citation were in violation of the Commission's Official General Order No. A-6 as amended, and that sale prices under said contract are in violation of any legally established minimum price applicable thereto.

67 13. The Commission erred in finding that its Official General Order No. A-6 fixed minimum wholesale prices applicable to said contract.

14. The Commission has not established any general order or fixed any minimum re-sale price expressly, or legally or reasonably applicable to sales of milk in such quantities and under such conditions as are involved in said contract.

15 The Commission erred in disregarding the uncontradicted evidence produced by appellant as to costs of supplying milk under said contract as compared with costs under ordinary sales circumstances.

16. The Commission erred in finding that appellant's testimony "does not show that Official General Order No. A-14, is inapplicable to the facts of this case or invalid."

17. The Commission erred in ruling that its said General Orders are applicable to sales to the United States or to an instrumentality of the United States.

18. Application of said General Orders to said contract and to sales in such quantities and under circumstances set forth in the evidence and pleadings is unreasonable and arbitrary in that it disregards the relation of production costs to selling price, and has no reasonable relation to the purposes for which resale prices

are established and upon the basis of which such price fixing has been legally sustained.

19. The Commission erred in basing its order in this case on an assumption or suggestion that appellant should have assumed the burden of instituting proceedings to have a different minimum price fixed by general order. The Commission has ample authority to on its own motion amend or revise its order as to prices.

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20. Appellant reserves the right to amend, amplify and supplement its specifications of error hereinabove stated.

21. This appeal is not taken for purposes of delay but because appellant verily believes it has been legally aggrieved by the order from which it appeals, and in order to have the matter determined according to law.

Therefore appellant respectfully prays the Court

(a) To declare the order herein appealed from ineffective, unconstitutional and void.

(b) To remit said order to said Commission with directions that it be revoked.

(c) To impose the costs on the said Commission.

(d) To grant such further, or other relief as law, equity, and justice require.

PENN DAIRIES, INC.,
Appellant.
By E. L. GARBER, *Pres.*

ARNOLD & BRICKER,
Attorneys for Appellant,
110 E. King St., Lancaster, Pa.

69 [*Duly sworn to by E. L. Garber; jurat omitted in printing*]

In the Court of Common Pleas of Lancaster County

Petition for supersedeas

To the Honorable, the Judges of the Court of Common Pleas of Lancaster County, Pa.

The petition of Penn Dairies, Inc. respectfully represents:

1. That it is the appellant named in the within appeal petition, being an appeal from an order of the Milk Control Commission of the Commonwealth of Pennsylvania.

2. That by said order, your petitioner's license to operate as a milk dealer in Pennsylvania would be refused from April 15, 1941 to April 19, 1941 both inclusive.

3. That the matters involved in said appeal are substantial matters of controversy as to the reasonableness, legality, and con-

stitutionality of the Commission's order, and of the jurisdiction of the Commission. The controversy involves sales of milk to the armed forces of the United States.

70 4. That if said order should be put into force pending disposition of said controversy, it would cause your petitioner irreparable injury in stoppage of extensive operations, would cause injury to large numbers of producers from whom appellant purchases milk and to consumers, including the United States Army to whom appellant supplies milk. The complaint being that appellant sold milk for less than the Commission seeks to require it to charge, no injury can be done to any person by suspension of the operation of said order pending disposition of said appeal.

Therefore your petitioner respectfully prays the Court to direct that the within appeal shall operate as a supersedeas, and to stay all proceedings with respect to the order appealed from until final disposition of said appeal.

PENN DAIRIES, INC.,
By: E. L. GARBER, *Pres.*

(Affidavit omitted.)

In the Court of Common Pleas of Lancaster County

Order of supersedeas

April 7, 1941

And now, April 7, 1941 it is ordered that the within appeal of Penn Dairies, Inc. from order of the Milk Control Commission of the Commonwealth of Pennsylvania, entered March 24, 1941 suspending said appellant's milk dealer's license shall operate as a supersedeas and all proceedings under said order are hereby stayed until final disposition of said appeal, the appellant having filed approved bond in the sum of $750.00.

By the Court,

OLIVER S. SCHAEFFER, *P. J.*

71 In the Court of Common Pleas of Lancaster County

Answer to appeal

Filed April 25, 1941

To the Honorable the Judges of Said Court:

And now comes the Milk Control Commission of the Commonwealth of Pennsylvania, appellee in the above proceeding, by

Frank E. Coho, Deputy Attorney General, and answers the appeal of Penn Dairies, Inc., in the above case, as follows:

1. The Milk Control Commission of the Commonwealth of Pennsylvania, appellee, hereinafter sometimes referred to as the "Commission," admits the allegations of paragraph 1 of the petition of appeal.

2. The Commission admits the allegations of paragraph 2 of the petition of appeal.

3. The Commission admits the allegations of paragraph 3 of the petition of appeal.

4. The Commission admits the allegations of paragraph 4 of the petition of appeal.

5. The Commission admits the allegations of paragraph 5 of the petition of appeal.

6. The Commission admits the allegations of paragraph 6 of the petition of appeal.

7. The Commission denies the allegations of paragraph 7 of the petition of appeal for the reasons hereinafter set forth.

8. The Commission denies the allegations of paragraph 8 of the petition of appeal, and in answer thereto avers that said
72 order is valid and within the jurisdiction of the Commission because it is a regulation of the appellant milk dealer in the same manner as other milk dealers operating in Pennsylvania are regulated, and no discrimination is made in the customers with whom the appellant or other milk dealers conduct business.

9. The Commission denies the allegations of paragraph 9 of the petition of appeal, and in answer thereto avers that the order of the Commission relates only to the appellant milk dealer and is not directed to the United States or any instrumentality thereof.

10. The Commission denies the allegations of paragraph 10 of the petition of appeal, and in answer thereto avers that the transactions concerned in the present case raise no questions of interstate commerce.

11. The Commission denies the allegations of paragraph 11 of the petition of appeal, and in answer thereto avers that the order of the Commission would deprive the appellant from carrying on its lawfully established business only for cause shown by due process of law as has been decided in Commonwealth vs. Rohrer, 37 Pennsylvania District and County Reports 410, 421; Rohrer v. Milk Control Board, 322 Pa. 257; Colteryahn Sanitary Dairy v. Milk Control Commission, 332 Pa. 15; Harrisburg Dairies Inc. v. Eisaman, 338 Pa. 58, and Rieck-McJunkin Dairy Co. v. Milk Control Commission, — Pa. —, decided March 24, 1941.

12. The Commission denies the allegations of paragraph 12 of the petition of appeal, and in answer thereto avers that the

73 record before the Commission showed that the actions of appellant were in violation of Official General Order A–6 as amended, and that the prices charged by appellant were in violation of legally established minimum prices applicable to the transactions in question.

13. The Commission denies the allegations of paragraph 13 of the petition of appeal, and in answer thereto avers that the record before the Commission supported its finding that Official General Order No. A–6 fixed minimum wholesale prices applicable to said contract.

14. The Commission denies the allegations of paragraph 14 of the petition of appeal, and in answer thereto avers that Official General Order No. A–6 as amended does fix minimum prices to be charged by the appellant and other milk dealers that are legally and reasonably applicable to sales of milk in such quantities and under such conditions as are involved in the present contract.

15. The Commission denies the allegations of paragraph 15 of the petition of appeal, and in answer thereto avers that the testimony on behalf of the appellant did not warrant the Commission in declaring Official General Order No. A–6 as amended invalid under the circumstances present.

16. The Commission denies the allegations of paragraph 16 of the petition of appeal, and in answer thereto avers that the Commission properly found that appellant's testimony did not show that Official General Order No. A–6 as amended by Official General Order No. A–14 was inapplicable to the facts of this case or invalid.

17. The Commission denies the allegations of paragraph
74 17 of the petition of appeal, and in answer thereto avers that the Commission properly ruled that the sale to the purchasing officer at Indiantown Gap was subject to the same regulations as sales to other consumers.

18. The Commission denies the allegations of paragraph 18 of the petition of appeal, and in answer thereto avers that in a proceeding between the Commission and appellant milk dealer it would be improper for the Commission to revise its price-fixing order without allowing all other interested parties an opportunity to be heard, as is required by Section 801 of the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j–801.

19. The Commission denies the allegations of paragraph 19 of the petition of appeal, and in answer thereto avers that the only application to revise the minimum prices prescribed in Official General Order A–6 as amended has been the defense set up by the appellant to this citation proceeding to refuse a milk dealer's license.

20. Paragraph 20 of the petition of appeal requires no answer.

21. Paragraph 21 of the petition of appeal requires no answer.

Wherefore, the Milk Control Commission of the Commonwealth of Pennsylvania, appellee herein, respectfully prays your Honorable Court to affirm the order of said Commission.

FRANK E. COHO,
Deputy Attorney General,
Attorney for Appellee.

(Affidavit omitted.)

75 In the Court of Common Pleas of Lancaster County

Motion for leave to file suggestion of the interest of the United States in the matter of litigation

June 9, 1941

Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, at the direction of the Attorney General of the United States of America, made pursuant to R. S. § 367, respectfully moves the Court for leave to appear in this action in his proper person for the purposes of filing the attached suggestion of the interest of the United States in the matter in litigation and of asserting such interest in this action and attending thereto. The grounds for this motion are as follows:

1. The United States has an interest and concern in the subject matter and outcome of this action, in opposition to the special order of the Milk Control Commission of the Commonwealth of Pennsylvania, issued on March 24, 1941 and described in the complaint filed herein by the Penn. Dairies, Inc. and to which reference is respectfully made, all as more fully set forth and explained in said suggestion; and pursuant to R. S. § 367, the Attorney General has directed the undersigned to present the annexed suggestion of the interest of the United States and to attend to the interests of the United States in this suit:

2. That the United States cannot be made a party defendant to this action under any existing provision of law.

76 Annexed hereto is a pleading entitled "Suggestion of the Interest of the United States in the Matter in Litigation." The undersigned moves that said pleading be deemed his appearance in his proper person for the assertion of and attendance to the interests of the United States therein set forth.

The undersigned further moves that the Court enter an order granting this motion and each part hereof and that such order further provide that the undersigned shall receive notice of all

proceedings herein and service of all papers required to be served upon parties to the action.

GERALD A. GLEESON,
United States Attorney.

Of Counsel
ENOCH E. ELLISON,
Attorney,
United States Department of Justice.

In the Court of Common Pleas of Lancaster County

Suggestion of the interest of the United States in the matter in litigation

June 9, 1941

Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, at the direction of the Attorney General of the United States of America, appears herein in his own proper person, and for the said United States gives the Court to understand and be informed as follows:

1. The United States of America (hereinafter sometimes called the "Government"), acting by and through the War Department, in order to provide for the common defense, at all relevant times has quartered and maintained, and continues to quarter and maintain, certain troops of the United States Army on certain lands known as the Indiantown Gap Military Reservation and located at Indiantown Gap, Pennsylvania, by means of public funds of the United States which have been duly appropriated by the Congress of the United States for such purposes and duly allocated thereto. With such funds the Government purchases, from time to time, among other things, large quantities of food, including milk and milk products, by and through its duly authorized Purchasing and Contracting Officer and its Finance Officer at said Reservation. The procurement of such food is indispensable to the continued health, subsistence and maintenance of such troops, and such purchases are made by said officers in strict accordance with the provisions of federal law and regulations with regard to procurement of such supplies.
78 The foods so purchased through said officers must comply with United States Army specifications and can be received for consumption only after they have passed the prescribed sanitary and specification inspections.

2. Pursuant to the requirements of federal statutes and on February 1, 1941, the said Purchasing and Contracting Officer

issued to each of a large number of milk dealers in the vicinity of said Reservation, including the Penn Dairies, Inc., petitioner herein, Invitation No. qm 517–41–14, which was accompanied by a Standard Government Form of Bid and a schedule of Special Purchase Conditions. By such papers each milk dealer was invited to submit bids on the said Standard Government Form of Bid as to the lowest prices at which it would supply certain items of milk and milk products set forth in the Continuation Schedule appended thereto. True copies of said Invitation and said Special Purchase Conditions are appended hereto, marked Exhibit "A" and Exhibit "B," respectively, and made parts hereof. Thereafter bids were received from 25 milk dealers on said Standard Government Form of Bid, including the said Penn Dairies, Inc., which submitted the lowest bids on items numbered 1, 3, and 7. A true copy of the bids of the said Penn Dairies, Inc., on said Standard Government Form of Bid is appended hereto, marked Exhibit "C" and made part hereof. The said bids of Penn Dairies, Inc., as to items numbered 1, 3, and 7 were accepted and the contract thereon was duly awarded to the Penn Dairies, Inc. Under date of March 1, 1941, a formal purchase order confirming the contract, a true copy of which is appended hereto, marked Exhibit "D" and made part hereof,
79 was duly issued and the Penn Daries, Inc., entered upon the performance of said contract.

3. The undersigned is informed and believes that it appears from papers already on file in this cause that, after the events described in paragraphs 1 and 2 hereof had transpired, the Penn Dairies, Inc. applied to the Milk Control Commission of the Commonwealth of Pennsylvania (hereinafter called the "Commission") for renewal of its milk dealer's license; that such application was denied by a special order issued March 24, 1941; and that a copy of such order appears as "Exhibit A" to the petition of the Penn Dairies, Inc., which said "Exhibit A" is adopted by this reference and prayed to be taken and considered as a part hereof as fully and completely as if set forth at length herein. It appears from said order that said application was denied upon the sole ground that in contracting with the Government as aforesaid, or in performing said contract, or both, the Penn Dairies, Inc. was found by the Commission to have violated certain laws of the State of Pennsylvania in that it offered to sell and sold the milk described in items numbered 1 and 3 of said contract at prices lower than the minimum price at which it was authorized to sell such milk by such laws and a certain General Order of the Commission.

4. In issuing said Special Order the Commission in effect held that sales of milk to the Government could be made only under authority of, pursuant to and in accordance with its said General Order and that any contract between the Government and any milk dealer in Pennsylvania whereby the latter agrees to
80 supply the Government with milk at a price lower than the minimum price fixed by the Commission is violative of the laws of the State of Pennsylvania.

5. Said Special Order constitutes a threat, against all milk dealers in the State of Pennsylvania, that similar action will be taken against them if they sell milk or milk products to the Government at prices lower than the minimum prices so fixed by the Commission.

6. If the said Special Order of the Commission is sustained, the Government will be irreparably injured by it in that it will not be able to procure milk for its armed forces, and for other governmental purposes, at prices lower than those fixed by the Commission, whereas, if said Special Order is set aside the United States will be able to make such purchases at the lowest prices at which the competing milk dealers are willing to sell. Accordingly the United States has an interest and concern in the subject matter and outcome of this litigation.

7. The United States is a sovereign Government, and is neither a "person" nor a "consumer" within the meaning of the Milk Control Law of Pennsylvania, and such law does not, and should not be construed to, authorize the Commission to fix minimum prices for the sale of milk or milk products to the United States;

8. Insofar as the provisions of the said Milk Control Law, or of any other law of the State of Pennsylvania, purport, or may be held, to authorize the Commission to regulate the minimum prices at which the Penn Dairies, Inc., or any other milk
81 dealer, may sell milk or milk products to the United States the same can not constitutionally be given such effect because they would conflict with laws of the United States (particularly R. S. 3709, 41 U. S. C § 5 and 10 U. S. C. §§ 1200, 1201), which are the supreme law of the land and binding upon the judges of the State of Pennsylvania, anything in the Constitution or laws of said State to the contrary notwithstanding.

9. The transactions and events described in paragraphs 1 and 2 hereof, transpired exclusively under the authority of and pursuant to the laws of the United States and were and are not dependent for their validity upon the laws of the State of Pennsylvania in any respect. The legislative authority of the State of Pennsylvania does not extend to said events and transactions,

nor does it permit the regulation of the prices which the United States must pay in order to procure the necessary provisions and supplies for its armed forces.

10. The said General Order of the Commission, if it were applicable to sales of milk and milk products to the Government, would constitute an unconstitutional burden upon, and interference with, the United States in the performance of its constitutional duties and functions.

11. If the said Milk Control Law, or any other law, of the State of Pennsylvania should purport, or be construed, to authorize the Commission to issue its said Special Order, or to decline to issue a milk-dealer's license to the Penn Dairies, Inc., by reason of any of the events described in paragraphs 1 and 2 hereof, or in the findings of fact made by the Commission,
82 the same is, to that extent, unconstitutional and inoperative because it is violative of the Constitution of the United States and particularly of Article I, Sec. 8, and of Article VI thereof, the Fourteenth Amendment thereto, and the implied provisions thereof.

Wherefore, the undersigned respectfully prays:

1. That, if for any reason any of the relevant findings of fact or allegations of the Commission should be deemed by the Court to be inconsistent with, or contrary to, any of the facts set forth herein, the Court should make, or cause to be made (through a remand or otherwise), by appropriate proceedings, a determination as to the truth or falsity of said findings or allegations.

2. That the Court determine and declare that the Commission is without lawful power or authority to fix or regulate the minimum prices which may be charged by milk dealers in making sales of milk and milk products to the United States.

3. That the Court declare the order herein appealed from, by the Penn Dairies, Inc., ineffective, unconstitutional and void.

4. That the Court remit said order to the Commission with directions that it be revoked.

5. And for such other and further relief as may be meet and proper.

GERALD A. GLEESON,
United States Attorney.

Of Counsel:
ENOCH E. ELLISON,
Attorney,
United States Department of Justice.

83 *Exhibit "A" to suggestion*

[All exhibits received in evidence by agreement at bar in court below.]

Standard Form No. 30.

Approved by the President June 10, 1927.

STANDARD GOVERNMENT FORM OF INVITATION FOR BIDS

(Supply Contract)

Invitation No. qm 517-41-14

February 1, 1941

DUPLICATE

Sealed bids, in triplicate will be received in this office until the date and hour named in the accompanying schedules and then publicly opened, for furnishing the materials and supplies called for therein.

Bids must be submitted upon the Standard Government Form of Bid (Standard Form No. 31), and in accordance with the Standard Government Instructions to Bidders (Standard Form No. 22) and any special instructions supplementary thereto.

Envelopes containing bids must be sealed and marked on the upper left-hand corner with the name and address of the bidder and the date and hour of opening an addressed to the purchasing agency named below:

PURCHASING AND CONTRACTING OFFICER,
Office of the Quartermaster
Indiantown Gap, Pennsylvania.

84 Marked: Bid for Milk, Buttermilk and Ice Cream—March 1 to June 30, 1941. Requirements.

To be opened: 10.00 a. m. Eastern Standard Time, February 15, 1941.

Page No. 1—Estimated Quantities are Monthly Requirements.

Note re Exhibit "B" to suggestion

[Exhibit B attached to the suggestion filed by the United States consists of "special purchase conditions" in connection with bids and contracts for various articles purchased by the United States, including milk. The portions thereof which are deemed pertinent to this case are set forth at length in the Commission's citation by which this proceeding was begun, and reference is hereby made thereto. To avoid encumbering the record the entire conditions are not printed.]

Exhibit "C" to suggestion

Standard Form No. 31.
Approved by the President June 10, 1927.

STANDARD GOVERNMENT FORM OF BID

(Supply Contract)

Invitation No. qm 517–41–14

February 1, 1941

85 Original
Duplicate
Triplicate

(Indicate which by erasure)

Opening Date for this Bid 10:00 a. m., E. S. T. February 15, 1941.

To Purchasing and Contracting Officer. Place, Lancaster, Pa., Indiantown Gap, Pennsylvania. Date, February 12, 1941.

In compliance with your invitation for bids to furnish materials and supplies listed on the reverse hereof or on the accompanying schedules, numbered: qm 517–41–14, Pages 1 to 3 inclusive and Sheets 1 to 9 inclusive, which are a part of this bid (for the period from March 1 to June 30, 1941 inclusive), the undersigned, a corporation organized and existing under the laws of the State of Pennsylvania, a partnership consisting of an individual trading as of the city of Lancaster, Pa., hereby proposes to furnish, within the time specified, the materials and supplies at the prices stated opposite the respective items listed on the schedules and agrees upon receipt of written notice of the acceptance of this bid within _____ days (30 days if no shorter period be specified) after the date of opening of the bids, to execute, if required, the Standard Government Form of Contract (Standard Form No. 32) in accordance with the bids as accepted, and to give bond, if
86 required, with good and sufficient surety or sureties, for the faithful performance of the contract, within 10 days after the prescribed forms are presented for signature.

Discount will be allowed for prompt payment as follows: 10 calendar days _____ percent; 20 calendar days _____ percent; 30 calendar days _____ percent; or as stated in the schedules.

(Time will be computed from date of the delivery of the supplies to carrier when final inspection and acceptance are at point of origin, or from date of delivery at destination or port of embarkation when final inspection and acceptance are at those

points, or from date correct bill or voucher properly certified by the contractor is received if the latter date is later than the date of delivery.)

PENN DAIRIES, INC.
(Full name of bidder.)
(s) J. F. GARBER,
J. F. Garber, *Treasurer*,
572 N. Queen St., Lancaster, Pa.
(Address)

(s) L. B. ALTHOUSE,
(Witness to signature.)
L. B. Althouse.

Bids must be properly witnessed; signed in Ink, and Submitted in Triplicate Sets. Page numbered _____ have been recovered.

87 NOTE.—See Standard Government Instructions to Bidders and copy of the Standard Government Form of Contract, Bid Bond, and Performance Bond, which may be obtained upon application.

To insure prompt payment bills should be certified as follows: See Paragraph 11, Page 3.

10-1803

U. S. Government Printing Office

Page No. 2

Standard Form No. 36.
Approved by the President June 10, 1937.

STANDARD GOVERNMENT FORM OF CONTINUATION SCHEDULE FOR STANDARD FORM 31 OR 33
(Supplies)

Invitation No. qm 517-41-14.

Item No.	Articles or services	Estimated quantity	Unit	Unit price	Amount Dls. Cts.
1	Milk, fresh, grade A, pasteurized, 1 qt. bottles, W/sanitary protective type caps, type II C-M-381B	135,000	Btl	.079	10,665.00
	ALTERNATE				
2	Milk, fresh, grade A, pasteurized, 1 qt. fiber containers, nonreturnable, type II, C-M-381B	125,000	Con		
3	Milk, fresh, grade A, pasteurized, ½ pt. bottles, W/sanitary protective type caps, type II-C-M-381B	540,000	Btl	.0215	11,610.00
88	ALTERNATE				
4	Milk, fresh, grade A, pasteurized, ½ pt. fiber containers, nonreturnable, type II C-M-381B	540,000	Con		
5	Buttermilk, plain, pasteurized, 1 qt. bottles, type A C-B-816	5,760	Btl	.07	403.20

Item No.	Articles or services	Estimated quantity	Unit	Unit price	Amount Dols. Cts.
	ALTERNATE				
6	Buttermilk; plain, pasteurized, 1 qt. fiber containers, nonreturnable, type A, C-B-816	5,760	Con		
7	Ice cream, brick form, quart containers, cut 7, 8, or other cuts, commercial flavors as called for EE-I-116A	720	Gal	.779	560.88

PENN DAIRIES, INC.
(*Bidder*).

Page 3—10-1800 (over)

89 *Exhibit "D" to Suggestion*

War Department.
Q. M. C. Form No. 308.
Revised April 19, 1937.

PURCHASE ORDER

War Department

Date March 1, 1941.

OFFICE OF THE QUARTERMASTER,
Indiantown Gap, Pa.
To PENN DAIRIES, INC.,
572 N. Queen Street, Lancaster, Pa.
Ship to Sales Officer Indiantown Gap Military Reservation.
Contract No. (If any) W qm 517-41-30.
Purchase Order (Office Identifying) No. O. I, qm 517-41-83.
Requisition No.

To expedite payment place the above numbers on all packages, bills, and correspondence.

Payment will be made by Finance Office at Indiantown Gap Mil. Res., Pa.

To whom invoices, in triplicate, will be rendered. See Par. 7 of instructions on the reverse side hereof.

The supplies and services to be obtained by this instrument are authorized by, are for the purpose set forth in, and are chargeable to Procurement Authority, No. quoted below, the available balance of which is sufficient to cover cost of same.

Auth. No. QM 13-P1-0260-A-0505-01.

90 In acordance with your formal bid dated February 15, 1941, No. qm 517-41-14, and subject to all conditions and requirements thereof, award is hereby made you for furnish-

ing the following articles. Allowable variations from quantities cited ..... per cent, exclusive of condition 7 on reverse side hereof.

Discounts Net.
F. O. B. Indiantown Gap, Pa.
Deliveries As Needed.
Inspection Indiantown Gap, Pa.

Quantity estimated	Unit	Article	Unit price	Total price
135,000	Btl	Milk, fresh, grade A, pasteurized, 1 qt. bottles W/sanitary protective type caps, type 11 C-M-381B.	$0.079	$10,665.00
540,000	Btl	Milk, fresh, grade A, pasteurized, ½ pt. bottles with sanitary protective type caps, type 11 C-M-381B.	.0215	11,610.00
720	Gal	Ice cream, brick form, quart containers, cut 7, 8, or other, cuts, EE-I-116A.	.779	560.88
		Total		22,835.88

JESSE E. DOCK,
1st. Lt. QMC,
Purchasing and Contracting Officer.

3-6743 (Stamped):
Certified True Copy.

JESSE E. DOCK,
1st. Lt. QMC,
Purchasing and Contracting Officer.

91 In the Court of Common Pleas of Lancaster County

Order allowing appearance for United States, etc.

June 9, 1941

This cause came on to be heard on the motion of Gerald A. Gleeson, United States Attorney for the Eastern District of Pennsylvania, for leave to appear in this action in his proper person for the purpose of suggesting in the interest of the United States, in the matter in litigation, and for other purposes, as directed by the Attorney General of the United States pursuant to R. S. Sec. 367, and upon consideration thereof, it is

Ordered that said motion is in all respects granted; and it is further

Ordered that Gerald A. Gleeson, United States Attorney, is hereby granted leave to appear in this cause for the purposes of suggesting the interest of the United States in the matter in litigation and of asserting such interest in this action and attending thereto, and that he shall receive notice of all proceedings

herein and service of all papers required to be served upon parties to the action; and it is further

Ordered that the pleading entitled "Suggestion of the Interest of the United States in the Matter in Litigation," annexed to said motion, be filed, and be deemed the appearance of the said United States Attorney in his proper person for the assertion of and attendance to the interests of the United States set forth in said Suggestion.

OLIVER S. SCHAEFFER,
President Judge.

Dated June 9, 1941.

92 In the Court of Common Pleas of Lancaster County

Opinion

July 25, 1941

SCHAEFFER, P. J.

The question for decision by the court is whether a milk dealer of Pennsylvania selling milk to the United States Government for use at a Military Reservation, located at Indiantown Gap, Pennsylvania, is subject to the minimum price orders of the Milk Control Commission of Pennsylvania in respect to such sales.

On March 5, 1941 the Milk Control Commission of Pennsylvania issued a citation to Penn Dairies, Inc., of Lancaster, Pennsylvania, to show cause why its application for a license to do business as a milk dealer for the year beginning May 1, 1941, and ending April 30, 1942, should not be refused, because it offered to sell and sold milk at less than the minimum prices as fixed by the Milk Control Commission of Pennsylvania. At a hearing held on March 18, 1941, Penn Dairies, Inc., admitted selling milk to the United States Government at less than the minimum prices, being at the rate of $0.079 instead of $0.095 for fresh pasteurized milk in quart bottles, and at $0.0215 instead of $0.025 for half pints, contrary to subdivision B of Section 4 of Official General Order A-6, as amended by Official General Order A-14 of the Commission. On March 25, 1941, the Milk Control Commission of Pennsylvania entered an order refusing the application of the Penn Dairies, Inc., for a milk dealer's license. An appeal was taken to this court and a supersedeas was granted, thereby
93 permitting the appellant to furnish milk to the Indiantown Gap Military Reservation under the contract until final disposition of this appeal. On June 9, 1941 the United States, upon petition and a suggestion of interest in the pending litigation, was allowed to intervene.

It is conceded as a general legal proposition that a State cannot regulate an instrumentality of the United States Government if it constitutes a direct burden upon the Government and interferes with the performance of its functions. Should it be invoked and applied in all cases, especially where public policy justifies its waiver? In Buckstaff Bath House Co. v. McKinley, 308 U. S. 358, 60 S. Ct. 279, it is said "That petitioner is subject to the Social Security Act [of Arkansas] is extremely relevant to the solution of the problem at hand. For that Act laid the foundation for a cooperative endeavor between the states and the nation to meet a grave emergency problem. As pointed out by this Court in Steward Machine Co. v. Davis, supra, 301 U. S. page 588, 57 S. Ct. page 891; 81 L. Ed. 1279, 109 A. L. R. 1293, that Act was an attempt to find a method by which the states and the federal government could 'work together to a common end'." In the Pennsylvania Milk Control Act of April 28, 1937, P. L. 417, the Legislature provided in Section 311: "The commission is hereby vested with authority to confer with legally constituted authorities of other states and of the United States with respect to uniform milk control within the states and as between states, to conduct joint investigations, to exchange information, hold joint hearings and issue joint, complementary or concurrent orders, and to enter into a compact or compacts for such uniform milk control,
94 subject to such Federal approval as may be authorized or required by law." Subdivision (i) of Section 10 of the Act of Congress of May 12, 1933, c. 25, Title I, 48 Stat. 37, as amended and reenacted by the Act of June 3, 1937, c. 296, Section 1, 7 U. S. C. A. Section 610 (i), shows that the state and federal price control laws relating to milk and other agricultural commodities are intended to be as uniform and all-inclusive as possible. This subdivision provides: "The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this chapter and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities." "Agricultural commodities" as used in these Acts mean, inter alia, "milk and its products." 7 U. S. C. A. Section 611.

The Commission contends that "one who contracts with the United States for the performance of services or the supply of materials does not thereby obtain immunity from state regulations." It is admitted that employes or officers of the United

States are free from state regulations that interfere with the functions of government. Ohio v. Thomas, 173 U. S. 276, 19 S. Ct. 453. However, this immunity generally is not applicable to private persons or corporations who enter into contracts with the United States Government to furnish materials or to render services in an independent capacity. In Metcalf & Eddy v.
95 Mitchell, 269 U. S. 514, 46 S. Ct. 172 (1926), Mr. Justice Stone referred to a party claiming immunity, "who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government or an impairment of the efficiency of its agencies in any substantial way." In James Stewart & Co. v. Sadrakula, 309 U. S. 94, 60 S. Ct. 431 (1940), the Supreme Court said: "While, of course, in a sense the contract is the means by which the United States secures the construction of its post office, certainly the contractor in this independent operation does not share any governmental immunity." In Buckstaff Bath House Co. v. McKinley, 308 U. S. 358, 60 S. Ct. 279 (1939) supra, it is stated: "The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter. Fidelity & Deposit Co. v. Pennsylvania, 240 U. S. 319." In Baltimore and Annapolis Railroad Co. v. Lichtenberg, United States, Intervener, 176 Md. 383, 4 Atl. (2d) 734 (1939), it was decided that the Public Service Commission of Maryland had power to require a certificate from a contractor engaged solely in the carrying of passengers for the Federal Government on a public project. It is said: "The court is of opinion that there is no such interference as is prohibited to the State by the United States Constitution. Only the use of the roads of the State by an independent
96 contractor is dealt with. There is no interference with any governmental instrumentality. A private instrumentality is availed of by contract, its use of the roads for gain to be turned to the service of the Government. And, as already stated, the court sees no foundation for holding that the Government may, for its greater convenience or for the sake of economy, relieve the contractor of the obligation to conform to the law. Such an independent agency, engaged in its independent trade, must, in our opinion, be considered unchangeably subject to the law in its operation whether it contracts for its services with the Government or with promoters of private enterprises. See James v.

Dravo Contracting Co., 302 U. S. 134, 149, 58 S. Ct. 208." The Supreme Court said: "The appeal is dismissed for want of a substantial Federal question."

The United States Government contends that the Commission seeks "to regulate or control the activities of the Federal Government," and that "the individual States are without constitutional authority to apply their several police power laws to the United States." The United States relies upon the immunity as defined by Mr. Chief Justice Marshall in 1819 in McCulloch v. Maryland, 4 Wheat. 316, 436, involving the right of the State to tax a bank of the United States. He said: "The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." In Johnson v. State of Maryland, 254 U. S. 51 (1920), Mr. Justice Holmes delivered the opinion of the court. There the question related to the necessity of a state license to
97 operate a government motor truck on the highways by an employe of the United States Post Office Department. He quoted from Osborn v. Bank of the United States, 9 Wheat. 738, as follows: "'Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.' In more recent days the principle was applied when the governor of a soldiers' home was convicted for disregard of a state law concerning the use of oleomargarine, while furnishing it to the inmates of the home as part of their rations. It was said that the federal officer was not 'subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority'." Later in 1928 in a dissenting opinion by Mr. Justice Holmes, Panhandle Oil Co. v. State of Mississippi, 277 U. S. 218, 48 S. Ct. 451, joined in by Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice McReynolds, he said: "To come down more closely to the question before us, when the Government comes into a State to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the State and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the State that makes the business possible
98 is just as necessary an element in the cost of production as labor or coal. * * * It does not appear that the Government would have refused to pay a price that included the

tax, if demanded, but if the Government has refused it would not have exonerated the seller. Pierce Oil Corporation v. Hopkins, 264 U. S. 137, 139, 44 S. Ct. 251." He referred to the Coast Guard or the officials of the Veterans' Hospital as instrumentalities of government, but said: "The question of interference with Government, I repeat, is one of reasonableness and degree and it seems to me that the interference in this case is too remote. Metcalf v. Mitchell, 269 U. S. 514, 46 S. Ct. 172." Mr. Justice McReynolds in his dissenting opinion said: "The doctrine of immunity is well established, but it ought not to be extended beyond the reasons which underlie it. * * * The federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necesary powers of the States, or prevent their efficient exercise."

The attitude of Mr. Chief Justice Hughes on the question at issue in this case is set forth aptly in an article by Robert H. Jackson, as Attorney General of the United States, in the American Bar Association Journal of July, 1941, Volume 27, page 410, as follows: "Apart from the field of taxation, however, the Chief Justice has gone very far in sustaining state regulatory statutes, particularly those which have been assailed as being in conflict with federal power. He has always appeared careful to concede the broad sweep of federal authority which could supersede the state statute if Congress should so desire; but even where Congress has legislated in the field, he has generally upheld the state statute if it was not in conflict with the federal legislation. State regulatory statutes generally have received hospitable consideration at his hands. His opinion in the historic Minnesota Mortage Moratorium case is illustrative of his willingness to respect the action of the legislature except where there is a clear constitutional prohibition." In James v. Dravo Contracting Co., 302 U. S. 134, 58 S. Ct. 208, supra, Mr. Chief Justice Hughes delivered the majority opinion of the court. He said referring to taxation by either the State or Federal Government: "As 'neither government may destroy the other or curtail in any substantial manner the exercise of its powers,' we said that the limitation upon the taxing power of each, so far as it affects the other, 'must receive a practical construction which permits both to function with the minimum of interference each with the other. * * *'" He also said: "The contention ultimately rests upon the point that the tax increases the cost to the government of the service rendered by the taxpayer. But this is not necessarily so. * * * If the payment of the state taxes imposed on the property and operations of the taxpayer 'affects the federal government at all, it at most gives rise to a burden which is consequential and remote and

not to one that is necessary, immediate or direct'." Mr. Justice Roberts in his dissenting and minority opinion held that a sales tax on commodities sold to the Government, though laid upon the seller, is invalid as directly burdening the Government's transaction. In referring to the principle of Federal immunity he said: "The question is not one of quantum, not one of the weight of the burden, but one of power. * * * Where the principle *applies* it is not affected by the amount of the particular tax or the
100 extent of the resulting interference, but is absolute." [Italics supplied.]

It seems that such difference of opinion arises not as to the fundamental law, but rather as to its application to the facts and circumstances of each case. In the construction of the Milk Control Act of Pennsylvania by Mr. Justice Roberts in Milk Control Board of Pennsylvania v. Eisenberg Farm Products, 306 U. S. 346, 59 S. Ct. 528 (1939), he said: "But in matters requiring diversity of treatment according to the special requirements of local conditions the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation or rendered unenforceable. These principles have guided judicial decision for more than a century. Clearly they not only are inevitable corollaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government. The difficulty arises not in their statement or in a ready assent to their propriety, but in their *application*." [Italics supplied.]

In Paterson Milk & Cream Co., Inc. v. Milk Control Board
101 et al., decided by the Supreme Court of New Jersey in 1937, 192 Atl. 838, it is said: "The second point made is that sales made to the United States government by the prosecutor, at prices below those fixed by the Milk Control Board, were not subject to the Milk Control Act of this state. * * * It was settled in Trinity Farm Construction Company v. Grosjean, 291 U. S. 466, * * * that where the United States deals with a corporation the corporation with which it deals is subject to state regulations. Hence, it would seem that the prosecutor was obliged

to obey the reasonable regulations of the Milk Control Board of this state, and the fact that he dealt with the United States government is no justification for his disregard of the reasonable regulations of this state." In Milk Control Board v. Gosselin's Dairy, Inc., 16 N. E. 2d 641, the Supreme Judicial Court of Massachusetts in 1938 said: "It is conceded of course, fully and ungrudgingly, that a State cannot attempt to regulate an instrumentality of the United States or impose burdens upon it which interfere with its operation and efficiency. On the other hand we apprehend that an institution of the Federal government situated within a State cannot wholly escape every consequence arising from a fact so pervasive and insistent as is the fact of location in the midst of a civilized community whose orderly existence and continuance are derived from and supported by another sovereignty of general powers. * * * There is no discrimination against the hospital. It can buy milk as others buy milk and at any price which competition may fix not lower than the established minimum. No burden upon it can result, even indirectly, which does not likewise fall upon all users of milk, including institutions of this
102 Commonwealth of comparable nature. No attempt is made in the law, or in the order of the board, or in this litigation to control or to give any order or direction to the veterans' hospital or to any of its officers. The incidence of the law is upon dealers in milk. Although enforcement of the law against such dealers may in fact affect the price of milk to the hospital as well as to others, yet that result is in its nature incidental and collateral rather than immediate and direct. . . . We incline to the view that a dealer furnishing milk in this Commonwealth to the veterans' hospital remains bound by the Massachusetts milk control law." This court in Commonwealth v. Wayne L. Rohrer, 45 Lanc. L. R. 553 (1937) reached a similar conclusion.

It is contended also that "the Milk Control Law does not purport and should not be construed to authorize the Commission to fix prices for sales of milk to the United States." Article VIII, Section 802 of the Milk Control Law of April 28, 1937, P. L. 417, authorizes the Commission to fix prices for milk sold, inter alia, by milk dealers to consumers. According to Article I, Section 103 of the Milk Control Law, "'Consumers' means any person, other than a milk dealer, who purchases milk for consumption or use." It is then provided in the same section that "'person' includes an individual, corporation, association, partnership, limited partnership, or other unincorporated enterprise owned by two or more individuals." In Baker et al. v. Kirschnek et al., 317 Pa. 225 (1935), it was decided that the Commonwealth is not a person within the meaning of special Act incorporating the Borough of Media which provides that it shall not be lawful for any

103 person or persons to sell intoxicating liquors within the limits of the borough. The court said: "In construing a statute, words are to be taken in their ordinary sense, unless, from a consideration of the whole act, it appears that a different meaning was intended." In Stanley v. Schwalby, 147 U. S. 508, 517, 13 S. Ct. 418 (1893), it was held that the United States was a "person" and could set up the bar of the state statute of limitations that ran in favor of persons. Mr. Chief Justice Fuller said: "Of course, the United States were not bound by the laws of the State, yet the word 'person' in the statute would include them as a body politic and corporate." In a recent case decided in 1941, United States v. Cooper Corporation et al., 61 S. Ct. 742, which is applicable to the case at bar in the interpretation of the statute in question, Mr. Justice Roberts in delivering the opinion of the court said: "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law. * * * Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction."

104 Whether or not the United States is a person, or a consumer of milk, within the meaning and purpose of the Milk Control Act depends largely upon the purpose or public policy intended to be served by that Act. While it is not the province of the court to determine what constitutes such policy in the field of public health, nevertheless, its purpose, as set forth in the preamble of the Act is recognized in Rieck-McJunkin Dairy Company v. Milk Control Commission of Pennsylvania, 341 Pa. 153 (1941), by Mr. Justice Stern: "The main purpose of the Milk Control Law [is] to insure a sufficient supply of wholesome milk, which cannot be accomplished unless, as the preamble of the act recites, 'the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk'." In United States v. Rock Royal Co-op, Inc., et al., 307 U. S. 533, 59 S. Ct. 993, Mr. Justice Reed said: "The power of a state to fix the price of milk has been adjudicated by this Court. * * * So essential is it for health that the consumer has been

willing to forego unrestricted competition from low cost territory to be assured of the producer's compliance with sanitary requirements." With this purpose and policy in mind the State Legislature intended that the word "consumer" as used in the Milk Control Act with respect to the sale of milk, be all-inclusive. The Act expressly and clearly excepts only a milk dealer. The Statutory Construction Act of Pennsylvania, May 28, 1937, P. L. 1019, Article IV, Section 54, provides: "Exceptions expressed in a law shall be construed to exclude all others." By excluding all others except a milk dealer both provisions of said Section 103, relating to consumer and person, are given effect in carrying out the
105 paramount purpose of the Milk Control Act in accordance with Section 63 of the same Act. In Keating v. White et al., 141 Pa. Superior Ct. 495, 504 (1940), quoting from New York Life Insurance Co. v. Guaranty Corporation, 321 Pa. 359, it is said: "To arrive at the real meaning, it is always necessary to take a broad general view of the act, so as to get an exact conception of its aim, scope and object. * * * The true meaning is to be found, not merely from the words of the act, but from the cause and necessity of its being made, from a comparison of its several parts and from extraneous circumstances." Such construction of the statute is not analogous to the situation presented in the case of Green et al. v. Milk Control Commission et al., 340 Pa. 1 (1940), where it was said: "The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistakable. * * * With the principle stated before us, turning to the law embodying the powers of the Milk Control Commission, we find nothing said about milk shipped to dealers on consignment. * * * We are asked by the Commonwealth to interpolate these words into the Act. This we cannot do without violating the important principle to which we have adverted." The case at bar involves the interpretation of words expressed in the statute rather than supplying words which are wanting in the statute.

It is argued that the Commission's price-fixing authority cannot be applied to government purchases constitutionally, because it would conflict with Federal statutes requiring competitive bidding and price competition. In Title 10 of the United States Code Annotated (July 5, 1884, c. 217, 23 Stat. 109; Aug.
106 24, 1912, c. 391, Section 3, 37 Stat. 591), it is provided in Section 1200 that in the letting of contracts for quartermaster supplies for the Army, "the award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids." However, it is not absolutely required under all conditions and in all instances as shown by Section 1201, Title 10 of the United States

Code Annotated Mar. 2, 1901, c. 803, 31 Stat. 905), which provides as follows: "Except in cases of emergency or where it is impracticable to secure competition, or in cases otherwise provided for, the purchase of all supplies for the use of the various departments, and posts of the Army and of the branches of the Army service shall only be made after advertisement; and said supplies shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered.". In Good Roads Machinery Co. of New England v. United States, 19 Fed. Supp. 652 (1937), it was decided that purchases of material and equipment for a civil works project by an administrator or officer of the United States were made under "public exigency" requiring immediate delivery, and hence advertising for competitive bids was not essential under Section 3709 of the Revised Statutes of the United States (41 U. S. C. A., Section 5).

In a written notice by the Pennsylvania Milk Control Commission to all milk dealers interested in submitting bids to the United States Government at Indiantown Gap, Pennsylvania, the Commission fixed the minimum milk prices to be considered by
107 the bidders in the preparation of their bids with respect to the grades of milk therein mentioned. This order and notice of the Commission did not prevent competitive bidding, after due advertisement, but fixed only the minimum prices to be submitted by the milk dealers of Pennsylvania. Furthermore, the Act of Congress above cited expressly provides that advertising and competitive bidding are not required "where it is impracticable to secure competition, or in cases otherwise provided for." In Lukens Steel Co. et al. v. Perkins et al., 107 Fed. Repr. (2d) 627, the United States Court of Appeals for the District of Columbia in 1939 decided that where a determination of the Secretary of Labor established minimum wages in a particular locality for purposes of public contracts and provided that such minimum wages should apply to all contracts awarded subject to the Act of Congress, it was binding on persons submitting bids for government contracts and on government agencies. This case was affirmed by the United States Supreme Court in 310 U. S. 113, 60 S. Ct. 869, but on other grounds.

The fact that the Commonwealth of Pennsylvania is the owner of the Military Reservation of 12,638¼ acres at Indiantown Gap, Pennsylvania, and permits the United States to use it for its troops, does not affect the fundamental legal question involved in this case, but it indicates a spirit of cooperation in our present national emergency.

Irrespective of the juridical phase of this case in relation to the United States Government and its increasing instrumental-

ities, it is evident that a general compliance with the Milk Control Act in question is in harmony with and promotes both
108 the Federal and State policy to provide pure and wholesome milk not only for our citizens but also for our soldiers.

The conclusion is reached that the appellant as a milk dealer of Pennsylvania is subject to the Milk Control Act of Pennsylvania, and, accordingly, must submit its bids for the sale of milk to the United States Government at the Indiantown Gap Reservation on the basis of minimum prices as promulgated by order of the Commission. Such conclusion is in accord with the decisions of the Supreme Courts of New Jersey and Massachusetts, supra.

In the Court of Common Pleas of Lancaster County

Judgment

July 25, 1941

And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941 refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to the Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained.

By the Court:

OLIVER S. SCHAEFFER, *P. J.*

118 *Supplemental appendix to record*

1. Letter from Under Secretary of War

WAR DEPARTMENT,
Washington, D. C., Apr. 21, 1941.

The Honorable, The ATTORNEY GENERAL.

DEAR MR. ATTORNEY GENERAL: Reference is made to your letter of April 1, 1941, requesting the comments and recommendations of the War Department with respect to the apparent effect of certain portions of Army Regulations No. 5-240 upon the purchase of milk in states where the minimum prices of this commodity are fixed under authority of state law. You suggest that, in order to give any meaning to subparagraph (3) paragraph 4g, Army Regulations No. 5-240, it would appear to be necessary to construe this subparagraph as a recognition on the part of the War Department that states and their local governmental units are authorized to fix the prices at which commodities and services can be sold to the United States to the same

extent that such prices are subject to regulation in transactions between individuals.

Notwithstanding the apparent duplication in certain portions of the regulations in question it is not conceded that either the statutes from which these regulations derive their power, or the regulations themselves when considered with the pertinent provisions of other regulations, or the consistent position of the War Department upon the question at issue, permits the suggested interpretation. It is to be particularly noted that the regulations in question pertain to cases where competition is impracticable, and not to cases of procurement after advertising, thus eliminating instances where two or more firms may furnish the supplies or service.

119

There is inclosed for your information a copy of an approval memorandum of The Judge Advocate General of the Army. Your attention is particularly invited to his recommendation for changes in the regulations under discussion. These changes are now under consideration and after publication a copy of the revised regulation will be forwarded to you. It is recommended that, pending publication of the changes just mentioned, appropriate steps be taken to protect the procurement of milk by the Army from price-fixing laws and regulations of the states.

Sincerely yours,

(Signed) ROBERT P. PATTERSON,
Under Secretary of War.

1 Incl.
Copy Memo. TJAG.

2. Memorandum from the Judge Advocate General

Contracts.
JAG 434.

APRIL 16, 1941.

Memorandum for the Under Secretary of War.

Subject: Letter from Department of Justice concerning application of AR 5-240 to purchase of milk.

130

1. By informal disposition slip from the Office of the Assistant Secretary of War, dated April 5, 1941, there was referred to this office for necessary action and preparation of reply for the signature of the Under Secretary of War, the inclosed letter from the Attorney General (FMS: EEE 106-11-70 219715-41 106-63-23), dated April 1, 1941, concerning the effect of subparagraph 4g, Army Regulations, No. 5-240, February 11, 1936, upon contemplated resistance to state control of the purchase of milk by the Army.

2. Reference was first made by the Attorney General to a recommendation by the Secretary of War contained in letter of March 3, 1941 (QM 434 PC–Proc. (Indiantown Gap)), that the United States Attorney be instructed to take appropriate action to restrain the Milk Control Commission of the Commonwealth of Pennsylvania from interfering with deliveries of milk by Penn Dairies at Lancaster, Pennsylvania, under its contract with the United States, and also to a letter from the Attorney General addressed to the Secretary of War under date of March 6, 1941, relative to the case of Milk Control Commission v. Millard E. Basehoar, Jr., trading as Crystal Springs Dairy, Littlestown, Pennsylvania (WD 324.5 CCC (7–19–40)).

Reference was then made in the letter from the Attorney General to the inclosures which include a copy of a letter from the Consolidated Milk Producers for San Francisco to the Director of Agriculture, State of California, requesting action to enjoin the current and threatened violation of the provisions of the Agricultural Code under contracts between certain local milk dealers and the United States Government to supply milk to the Army at prices below the minimum wholesale schedule established for the San Francisco marketing area. In this letter the Consolidated Milk Producers made the following statement:

121 "* * * Under army regulations No. 5–240, where the price is fixed by competent state authority, the item is regarded as removed from the field of competition insofar as prices are concerned.

After quoting portions of paragraph 4, AR 5–240, February 11, 1936, the Attorney General continued:

"In our informal discussion of the above quoted regulations before we had an opportunity to inspect the text there was some indication that they were intended to apply only to cases where competition was impracticable because due to State regulations a single potential bidder had been given exclusive franchise or a monopoly in effect. However, upon inspecting other provisions of Army Regulations No. 5–240.4, g, it appears that if subdivision (3) was intended to be limited to such cases it would be mere surplusage. In other words in order to give the subdivision any meaning it would appear to be necessary to construe it as a recognition on the part of the War Department that States, municipalities, and other competent legal authorities are authorized to fix the prices at which commodities and services can be sold to the United States to the same extent that such prices are subject to regulations in transactions between individuals. If this is so, unquestionably it would be most difficult to protect Army milk purchases from State price regulations so long as subdivision (3)

continues in effect. Certainly this Department would be reluctant to bring the injunction suit which you requested in connection with Penn Dairies matter.

"Of course the matter of amending the Regulations is
122 entirely within your jurisdiction and we do not wish to foreclose the question of instituting the injunction action even if such regulations remain in effect, provided of course that there is some logical explanation for subdivision (3) other than the one given above."

3. The pertinent provisions of AR 5-240, February 11, 1936, as changed by Procurement Circular No. 10, July 6, 1938, read as follows:

"1. * * *

"a. The following are not open-market purchases:

"(1) Those made after advertising for bids as prescribed in AR 5-240.

* * * * * * *

"4. Open-market procurement; authorizations.—the statutory requirements for formal advertising may be dispensed with and procurement of supplies made in the open market in the following cases:

* * * * * * *

"g. Competition impracticable—general authorization.—Supplies may be procured without competition only when it is impracticable to secure competition, or when purchase without competition is expressly authorized by statute. In the following cases the supplies or circumstances are such as to make competition impracticable and, therefore, under existing law (par. 2b) purchase may be made in the open market without competition.

"(1) When the articles are purchased from a sole manufacturer or dealer, no suitable similar article being obtainable.

123 "(a) This authority is applicable only when there is but one dealer within a reasonable distance able to furnish the supplies or services or the article has no counterpart in the commercial world.

(b) It is not sufficient to justify the purchase of a particular make of an article under this authority when other makes are available which will accomplish the same result.

(c) Purchases of the following services from the only firm maintaining connection with the station are clearly within this provision: Telephone, telegraph, time, water, electricity, and gas. See (6). (c) below.

* * * * * * *

"(3) When the price is fixed by Federal, State, municipal, or other competent legal authority.

"(a) Where a municipality fixes the price of a commodity or service and no other source of supply is available, purchase in the open market under this authority is applicable.

"(b) The authority fixing the price must be legal. This will not be construed as being applicable in cases where the authority fixing the price is a corporation or an individual. The agency fixing the price must be governmental."

The general statutory authorizations for the foregoing procedure are quoted below:

"All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public
124 exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals." (R. S. 3709; 41 U. S. C. 5.)

"* * * That hereafter, except in cases of emergency or where it is impracticable to secure competition, the purchase of all supplies for the use of the various departments, and posts of the Army and of the branches of the army service shall only be made after advertisement and shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered; * * *" (act March 2, 1901 (31 Stat. 905; 10 U. S. C. 1201)).

"Hereafter the purchase of supplies and the procurement of services for all branches of the Army service may be made in open market, in the manner common among businessmen, when the aggregate of the amount required does not exceed five hundred dollars; but every such purchase exceeding one hundred dollars shall be promptly reported to the Secretary of War for approval, under such regulations as he may prescribe" (act June 12, 1906 (34 Stat. 258; 10 U. S. C. 1203)).

4. It will be noted that the present inquiry relates to the provisions of regulations dealing with open-market procurement and not with procurement after advertisement. Indicative of the general policy of the War Department in respect of

125 state price-fixing laws is paragraph 11e, AR 5–100, August 7, 1940 (formerly paragraph 11d—renumbered by Procurement Circular No. 9, February 3, 1941), which provides as follows:

"State price-fixing laws.—Appropriated funds may not be used for payments under awards upon invitations for bids containing restrictive requirements of showing compliance with State price-fixing laws relating to services, commodities, or articles necessary to be purchased by the United States until there has been an authoritative and final judicial determination that such State statutes are applicable to such contracts. It is not the duty or responsibility of contracting officers of the Federal Government, by means of restrictive specifications, to enforce contractors to comply with the requirements of price-fixing acts of a State. See 16 Comp. Gen. 97, 34g; 17 id. 287; 19 id. 614."

AR5–100, in which the above quoted provision appears, is entitled "Procurement of Supplies; General Provisions." Thus it may be regarded as applicable to the usual purchases made by the War Department. It is only in the case of an open-market purchase, under the exceptional circumstances outlined in the statutes quoted above, that the provisions of paragraph 4, AR 5–240, come into play. Undoubtedly, most of the contracts for the supply of milk for the armed forces are in amounts exceeding $500 and may not be made as open-market purchases except in case of an emergency or where competition is impracticable. Moreover, it should be noted that the heading of paragraph 4g AR–240, reads "Competition impracticable." Therefore, if any policy is to be derived from that paragraph it must be limited, in my

126 view, to cases where there is only one available source of supply. In this connection attention is invited to the first explanatory paragraph (a), under subparagraph 4g (3), where the words "and no other source of supply is available" appear. In view of the foregoing, subparagraph 4g (3) may be explained as an authorization for procurement in the open market, under the exceptional circumstances of impracticability of competition, in order to permit the purchase of needed supplies for the troops despite the possibility of price-fixing by the listed governmental units. Accordingly, it is believed that the quoted interpretation placed upon subparagraph 4g (3) by the Consolidated Milk Producers is untenable when that subparagraph is considered in its context, in the light of the provisions of other Army Regulations and in view of the basic statutes upon which the regulations depend.

5. Furthermore, the War Department has consistently taken and maintained the position that price-fixing measures of the states have no application to procurements by the War Department (JAG 163, Nov. 9, 1935; JAG 434, Sept. 28, 1936; JAG 536, July 14, 1938; JAG 434, Aug. 31, 1938; id. June 26, 1940). Such departmental interpretation of its own regulations over an extended period is entitled to great weight and, in my view, should prevail despite a possible overlapping in the detailed provisions of certain paragraphs of those regulations.

6. However, in view of the suggested interpretation of the regulations in question by the Attorney General and the apparent misapprehension of the War Department's position in this matter by the Consolidated Milk Producers of San Francisco, it is recommended that appropriate changes in these regulations
127 be made to the end that their intended meaning will be clear and that the position of the War Department in the premises will hereafter be accurately reflected. The recommended changes in AR 5–240 are as follows:

Change subparagraph (1), paragraph 4g, to read as follows:

(1) When the supplies are purchased from a sole manufacturer or dealer, no suitable similar supplies being obtainable.

Change subparagraph (1) (a), paragraph 4g, to read as follows:

(a) This authority is applicable only when there is but one dealer within a reasonable distance able to furnish the article or service or the article has no counterpart in the commercial world.

Rescind subparagraph (3), paragraph 4g in its entirety.

In connection with the changes here proposed, attention is invited (a) to the provisions of paragraph 1 (a), AR 5–100, as changed by Procurement Circular No. 10, July 6, 1938, wherein it is provided that the term "supplies" will be considered to include both materials and nonpersonal services and (b) to the provisions of subparagraph (1) (c), paragraph 4g; AR 5–240, February 11, 1936, as changed by Procurement Circular No. 10, July 6, 1938, and set forth in paragraph 3 of this memorandum, which adequately provides for the procurement of utilities where only one source of supply is available.

7. There is submitted herewith draft of reply for the signature of the Under Secretary of War.

ALLEN W. GULLION,
Major General,
The Judge Advocate General.

128 2 Incls.
Incl. 1—Ltr. fr. Asst. Atty. Gen., 4/1/41, w/3 incls.
Incl 2—Drft. ltr. to Atty. Gen.

5. Order amending Army regulations

Proc. Cir. 35

Procurement Circular No. 35

WAR DEPARTMENT,
Washington, May 10, 1941.

Section I

Changes in AR 5-240—

* * * * * *

I—Changes in AR 5-240. * * *

2. Pending the printing of changes in AR 5-240, February 11, 1936, paragraph 4g of those regulations is rescinded and the following substituted therefor:

4g. Competition impracticable—general authorization.—Supplies may be procured without competition only when it is impracticable to secure competition or when purchase without competition is expressly authorized by statute. In the following cases the supplies or circumstances are such as to make competition impracticable, and therefore, under existing law (par. 2b), purchase may be made in the open market without competition.

(1) When the supplies are purchased from a sole manufacturer or dealer, no suitable similar supplies being obtainable.

(a) This authority is applicable only when there is but
129 one dealer within a reasonable distance able to furnish the article or service or the article has no counterpart in the commercial world.

(b) It is not sufficient to justify the purchase of a particular make of an article under this authority when other makes are available which will accomplish the same result.

(c) Purchases of the following services from the only firm maintaining connection with the station are clearly within this provision: Telephone; telegraph, time, water, electricity; and gas. See (5) (c) below.

(d) Purchases of the following are clearly within this provision: Fare on toll bridges, and toll roads, city busses and city railways, river ferries; and pilotage charged.

(2) When the article is patented and for sale only by patentee or his agent at a fixed and uniform price.

(a) Obviously, competitive bidding under this condition would result in no advantage to the Government.

(b) Where two or more articles are capable of producing similar results, it is improper to purchase one without advertising, to the exclusion of the other, even though one or all are patented.

(3) When the articles are parts of apparatus already in use and can only be furnished by one dealer.

(a) Competition in many cases would be impracticable under this condition. Care must be exercised in ascertaining the facts, as parts for many articles may be obtained from other than the original manufacturer of the article. See 7 Comp. Gen. 282.

(b) The foregoing authorization applies only to parts of
130 apparatus already in use and does not authorize the purchase of new apparatus without competition simply because a supply of spare parts of the apparatus is already in stock.

(4) When an emergency exists such that there is no time to obtain competition. See f above.

(A. G. 400.123 (5-3-41).)

By order of the Secretary of War:

G. C. MARSHALL,
Chief of Staff.

Official:

E. S. ADAMS,
Major General,
The Adjutant General.

131 In Superior Court of Pennsylvania

PENN DAIRIES, INC., APPELLANT

v.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

October Term, 1941—No. 311

Assignments of error of Penn Dairies, Inc.

Filed Oct. 29, 1941

Penn Dairies, Inc., the appellant in the above entitled case, assigns as error the following acts of the Court of Common Pleas of Lancaster County from whose decree the above entitled appeal has been prosecuted.

1. The court below erred in affirming the order of the Milk Control Commission as follows:

Order of the Commission.—And now, this 25th day of March, A. D. 1941, the application of Penn Dairies, Inc., Lancaster, Pennsylvania, the respondent herein, for a milk dealer's license for the year May 1, 1941 to April 30, 1942, inclusive, is refused for the reasons above stated (56a).

Order of the Court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Penn-

sylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

2. The court below erred in overruling appellant's exception set forth in paragraph 8 of appeal to the Court of Common Pleas, as follows:

Exception 58a).—"The said order is unconstitutional
132 and void and beyond the jurisdiction of the Commission, in that it attempts to interfere with and regulate a contract between appellant and the United States and to prevent performance of said contract, or to penalize appellant for making and performing it."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

3. The court below erred in overruling appellant's exception set forth in paragraph 9 of appeal to the Court of Common Pleas, as follows:

Exception (58a).—"The said order is an unlawful and unconstitutional interference with the raising and supporting of the armed forces of the United States."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

4. The court below erred in overruling appellant's exception set forth in paragraph 10 of appeal to the Court of Common Pleas, as follows:

133 Exception (58a).—"The said order violates Article I, Section 8 of the Constitution of the United States."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

5. The court below erred in overruling appellant's exception set forth in paragraph 11 of appeal to the Court of Common Pleas, as follows:

Exception (58a).—"The said order would prevent appellant from carrying on its lawfully established business, and would deprive it of its property and the use thereof without due process of law and contrary to the law of the land, in violation of Amendment XIV of the Constitution of the United States, Article I, Sections 1 and 9 of the Constitution of Pennsylvania."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

134 6. The court below erred in overruling appellant's exception set forth in paragraph 12 of appeal to the Court of Common Pleas, as follows:

Exception (58a).—"The Commission erred in concluding that the actions of appellant complained of in said citation were in violation of the Commission's Official General Order No. A-6 as amended, and that sale prices under said contract are in violation of any legally established minimum price applicable thereto."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

7. The court below erred in overruling appellant's exception set forth in paragraph 14 of appeal to the Court of Common Pleas, as follows:

Exception (59a).—"The Commission has not established any general order or fixed any minimum re-sale price expressly, or legally or reasonably applicable to sales of milk in such quantities and under such conditions as are involved in said contracts."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's

135 license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

8. The court below erred in overruling appellant's exception set forth in paragraph 17 of appeal to the Court of Common Pleas, as follows:

Exception (59a).—"The Commission erred in ruling that its said General Orders are applicable to sales to the United States or to an instrumentality of the United States."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

9. The court below erred in ruling that the Pennsylvania Milk Control Law confers on the Milk Control Commission authority to fix minimum prices for sales of milk to the United States, on issue raised by appellant's answer, as follows:

Answer (14a).—The Commission is without jurisdiction under the laws and constitution of Pennsylvania or under the laws and constitution of the United States to limit, regulate, control or interfere with the prices or other terms of a contract between the respondent and the United States or any agency or instrumentality thereof

136 Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

(Signed) ARNOLD & BRICKER,
By HARRIS C. ARNOLD,
Harris C. Arnold,
Attorneys for Appellant.

[File endorsement omitted.]

137 In Superior Court of Pennsylvania, Philadelphia District

[Title omitted.]

Assignments of error of the United States

Filed Oct. 31, 1941.

On behalf of the United States of America as intervenor appellant, in the above entitled case the following acts are assigned as error on the part of the Court of Common Pleas of Lancaster County, from whose decree the above entitled appeal has been prosecuted.

1. The court below erred in affirming the order of the Milk Control Commission as follows:

Order of the Commission.—And now, this 25th day of March, A. D. 1941, the application of Penn Dairies, Inc., Lancaster, Pennsylvania, the respondent herein, for a milk dealer's license for the year May 1, 1941, to April 30, 1942, inclusive, is refused for the reasons above stated (56a).

Order of the Court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

2. The court below erred in denying the second prayer of the suggestion of the interest of the United States, as follows:

Prayer (74a).—"That the court determine and declare that the Commission is without lawful power or authority to fix or regulate the minimum prices which may be charged by milk dealers in making sales of milk and milk products to the
138 United States.

Order of the court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

3. The court below erred in denying the third prayer of the suggestion of the interest of the United States as follows:

Prayer (74a).—"That the court declare the order herein appealed from, by the Penn Dairies, Inc., ineffective, unconstitutional, and void."

Order of the court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvaia, the appellant, is sustained (100a).

4. The court below erred in denying the fourth prayer in the suggestion of the interest of the United States as follows:

Prayer (74a).—"That the court remit said order to the Commission with directions that it be revoked."

Order of the court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

(Signed) GERALD A. GLEESON,
Gerald A. Gleeson,
United States Attorney.
J. BARTON RETTEW, JR.,
J. Barton Rettew, Jr.,
Assistant United States Attorney.

[File endorsement omitted.]

139 In the Superior Court of Pennsylvania

No. 144

[Title omitted.]

Opinion

Filed March 3, 1942

Opinion by KENWORTHEY, J.

The questions are: (1) Whether the Milk Control Law[1] authorizes the Milk Control Commission to fix minimum prices for the sale of milk to the United States; (2) whether there was, on February 15, 1941, any order of the Commission which, when properly construed, applied to such sales; and (3) if these questions are answered in the affirmative, whether the law, and the order issued pursuant to it, cast an unconstitutional burden upon the government.

The facts are virtually undisputed. On February 1, 1941, the government purchasing officer, at Indiantown Gap, sent to
140 various milk dealers, including defendant,[2] invitations to bid on the milk requirements for the Army reservation located there. The requirements called for the delivery of 135,000 one-quart bottles and 440,000 half pint bottles between March 1st and June 30, 1941. On February 4, 1941, the Milk Control Commission promulgated a notice "To All Milk Dealers Interested In Submitting Bids to Furnish Milk to the United States Government at Indiantown Gap," one of which went to defendant. Accompanying the notice, were copies of the orders which the Commission deemed applicable. The notice indicated the minimum price to be $0.095 per bottle for the milk sold in quarts and $0.025 for that sold in half-pints, and the notice closed with a warning that any sales at prices below the prescribed minimums would be construed as violations of the law. The notice, except for the tabulation of specifications, is printed in the margin.[3]

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[1] Act of April 28, 1937, P. L. 417, 31 PS 700j.

[2] Penn Dairies, Inc., for convenience, will be referred to as "defendant" in spite of the fact that Section 904 provides: "The appeal provided by this article from action of the Commission shall be by petition against the Commission, officially as defendant." This case was started by a citation against Penn Dairies, Inc., in which it was the defendant.

[3] "The quantities for the above items are listed as the estimated quantities required for each month during the period from March 1, 1941, to June 30, 1941, inclusive.

"For your information and guidance, we are enclosing herewith a copy of our official General Order A-14, applicable to Area No. 11, the Statewide Milk Marketing Area, in which area Indiantown Gap, Pennsylvania, is located, and direct your attention to subparagraph (b), Section 4, of said Order setting forth the minimum wholesale prices to be charged by or paid to milk dealers for Grade A milk, either raw or pasteurized; for Grade B milk, either raw or pasteurized, not exceeding 4.0% butterfat content; and for Plain Buttermilk, sold in bottles or other containers, in said Area No. 11.

"The Commission construes the Government Facility at Indiantown Gap, Pennsylvania, as a training camp or reservation, and as such, where milk is required in half-

142 On February 15, 1941, the bids were opened and the contract awarded defendant as the lowest bidder. Defendant's bid for both quantities—$0.079 for the quarts and $0.0215 for the half-pints—was below the minimums.

On March 5, 1941, the Commission issued a citation to defendant to show cause why its application for a milk dealer's license for the year May 1, 1941, to and including April 30, 1942, should not be refused. The sole ground alleged was the aforesaid violation of its Order. Defendant, by answer, raised the questions which are now before this court. The Commission, having refused the license in an order which, on appeal, was sustained by the Court of Common Pleas, defendant took this appeal.

First.—Does the Milk Control Law authorize the Commission to fix minimum prices for milk sold to the government?

The Act, Section 802, provides: "The Commission shall fix * * * the minimum wholesale and retail prices * * * to be charged for milk sold within any milk marketing area of the Commonwealth wheresoever produced, *including* milk sold by: 1. milk dealers to other milk dealers; 2. milk dealers to consumers; 3. milk dealers to stores * * *; 4. stores to consumers * * *." (Italics supplied.) Conceding, arguendo, that the government is not included in any of the enumerated classes, the question is whether "including" is a word of limitation—whether it means "including only." It is sometimes thus used; it is perhaps more

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pint bottles or half-pint paper containers, would be entitled to the special wholesale half pint school prices of said Order No. A-14.

"Where milk dealers propose to furnish Grade A milk, pasteurized Grade B milk, not exceeding 4.0% butterfat content, or Plain Buttermilk meeting Federal Specifications, the following minimum unit prices should be considered in the preparation of their bids:

Product	Unit prices	
	Quarts	Half pints
Grade A milk, either raw or pasteurized	$0.115	$0.035
Grade B milk, either raw or pasteurized, not exceeding 4.0% butterfat content	.095	.0275
Plain buttermilk	.07	

"Includes service charges for ice, straws, or special boxes. If these services are not rendered, these prices may be reduced by $0.0025 per half pint.

"The Commission suggests that milk dealers acquaint themselves with Federal Specifications for milk, particularly C-M-381 B.

"Any purchases or sales of milk made or offers to buy or sell milk at prices below the prescribed minimum prices of effective Official General Orders of this Commission are construed as violations of the Milk Control Law.

"The Milk Control Commission expects compliance with its orders, rules, and regulations, and will appreciate your cooperation in this matter.

"COMMONWEALTH OF PENNSYLVANIA
MILK CONTROL COMMISSION,
EDWIN H. RIDGWAY, *Secretary*."

often used as a word of extension or enlargement.[4] "To
143 arrive at the real meaning, it is always necessary to take a broad general view of the act, so as to get an exact conception of its aim, scope, and object." Keating v. White et al., 141 Pa. Superior Ct. 495, 504, 15 A. (2d) 396; Statutory Construction Act of May 28, 1937, P. L. 1019, 46 PS 551, 554, 563. The purpose of the law (Sec. 101) is to regulate and control the milk industry "for the protection of the public health and welfare and for the prevention of fraud." Section 801 provides: "The Commission shall base all prices upon all conditions affecting the milk industry in each milk marketing area, including the amount necessary to yield a reasonable return to the producer and to the milk dealer." As Mr. Justice Stern said in Rieck-McJunkin Dairy Company v. Milk Control Commission, 341 Pa. 153, 157, 18 A. (2d) 868: "The main purpose of the Milk Control Law [is] to insure a sufficient supply of wholesome milk, which cannot be accomplished unless, as the preamble of the act recites, 'the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk.' * * *." Although the prices to all classes of producers or dealers need not be the same, it is apparent that, in order to carry out the purpose of the law, the price-fixing power must extend to *all* sales of milk by both producers and dealers. If these purposes are carried out, the legislation will inure to the benefit of the government as a part of a community within the Commonwealth, as well as to other consumers. On the other hand, if the policy of the law is not carried out as to the largest single buyer, the purpose may be frus-
144 trated. The Supreme Court has held that the provisions of the law apply to a governmental subdivision of this Commonwealth. Zeuger Milk Co. v. Pittsburgh School District, 334 Pa. 277, 5 A. (2d) 885. We hold that the Legislature intended the Commission to have the power to regulate the prices of sales to the United States, provided it is not unconstitutional.[5] And, in view of this conclusion, it is not necessary to consider whether the government is a "consumer" as defined in the act.

Second.—Had the Commission, on February 15, 1941, issued any order fixing the minimum price of sales to the government for consumption at an army camp?

The Commission contends that the price was fixed by official General Order No. A-6, as amended by A-14.[6] The order pro-

[4] American Surety Co. v. Marotta, 287 U. S. 513, 53 S. Ct. 260; Cannon v. Nicholas, 80 Fed. (2d) 934 (C. C. A. 10th); Weller & Weller v. The Grange Mutual Casualty Insurance Co., 105 Pa. Superior Ct. 547, 161 A. 615; McClathery's Estate, 311 Pa. 351, 166 A. 886.

[5] The Statutory Construction Act of May 28, 1937, P. L. 1019, Article IV, Sec. 52, 46 PS 552, provides that in construing an act, the courts shall presume: "(3) That the Legislature does not intend to violate the Constitution of the United States or of this Commonwealth."

[6] "(B) Minimum Wholesale Prices.—Milk dealers to other milk dealers and to stores for resale; and to bakeries, hotels, restaurants, hospitals and institutions for consumption on the premises:"

vided wholesale prices for sales by "Milk dealers to other
145 milk dealers and to stores for resale; and to bakeries, hotels, restaurants, hospitals and *institutions*. * * *. [Italics supplied.] The price fixed for Grade B milk, not exceeding 4% butterfat, is $0.95 for quarts and $0.25 for half-pints. But there is a special provision for sales to schools, fixing $0.0275 for half-pints. It is to be noted that, for the sales of half-pints, the Commission allowed the lowest price on the schedule. Defendant admits the Indiantown Gap Military Reservation is an institution.[1] Defendant argues that, because of the unprecedented size of the contract—it was conceded to have been the largest single order for milk ever given in this Commonwealth—the cost to it of servicing the contract would be considerably reduced, that it could make a reasonable profit and maintain the price to the producers with a lower return, and that it is, therefore, unreasonable to suppose that the Commission intended the prices in Order A–14 to apply. The principal difficulty with this contention, as we see it, is that the evidence offered does not support it. Defendant offered, by stipulation,[2] figures to show "its average bottle breakage and losses where milk is served under ordinary conditions" as compared to losses from similar causes under the contract, there being an alleged difference of 2%. In the
146 same manner, it offered evidence to show that under "ordinary circumstances delivery of the same quantity of milk would require a large number of trucks and drivers" and that, under the contract, there was a saving of delivery cost on each bottle of $0.0005. But there is nothing to indicate what the "ordinary circumstances" or the "ordinary conditions" were. Obviously, the difference in the cost of servicing a thousand customers is materially larger than the cost of servicing one. But the cost

Product	Unit price		
	Quart	Pint	Half-pint
Grade "A" milk	$0.115	$0.06	$0.035
Grade "B" milk:			
Exceeding 4.0% B. F.	.105	.06	.035
Not exceeding 4.0% B. F.	.095	.05	.035
Grade "B" milk to schools not exceeding 4.0% B. F.			.0275
Cream buttermilk, chocolate milk, and other flavored milk or milk drink containing more than 0.5% butterfat	Same as Grade "B" milk exceeding 4.0% butterfat		
Skim milk	.06		
Buttermilk—Plain	.07	.05	.03

(One Gallon, Single Container, Single Delivery, $0.25.)"

[1] The citation averred: "6. Indiantown Gap, a United States Military Reservation, is an institution of the United States for military training," and this averment was admitted in the corresponding paragraph of the answer.

[2] The stipulation was in two parts. It provided that paragraphs 1, 2, and 3, which have no application to the present question, "shall be treated as admitted facts." It then provided: "It is further agreed that the statements in the following paragraphs shall be received in evidence as competent testimony * * *." Although the statements in these subsequent paragraphs were not contradicted, they were obviously intended to have less weight than those in the first three and we consider that they were open to analysis and that we are not bound by the inferences defendant would draw from them.

of servicing five or ten customers may not be. The schedule of prices fixed by the Commission for this contract, being the lowest possible, the cost must be compared, if the comparison is to be used as valid argument, with the cost of servicing other *large* customers, such as hotels, restaurants, hospitals and other large institutions. If the figure offered by defendant for comparison was weighted by the cost of servicing small individual customers, the figure is of no value whatsoever. And there is no indication of what, exactly, the comparison means. We hold General Order A-1, as amended by A-14, covered the sale to the government.

Third.—Does the Order impose an unconstitutional burden upon the government?

The extent to which, under our dual system of government, the states may burden the operations of the federal government has long been the subject of controversy. The Constitution does not expressly deal with it. From McCulloch v. Maryland,[9] decided in 1824, down to James v. Dravo Construction Co.,[10] de-
147 cided in 1937, Chief Justice Marshall's dictum that the power to tax is the power to destroy was the prevailing doctrine. Under it, any law which imposed a demonstrable burden on the government was held to be unconstitutional.[11] But, as Mr. Justice Holmes pointed out in his dissent in the Panhandle Oil Case,[12] "In those days it was not recognized, as it is today, that most of the distinctions of the law are distinctions of degree," and, "The power to tax is not the power to destroy while this court sits."[13] And the decisions in Graves v. O'Keefe[14] and Alabama v. King & Boozer[15] have swept the doctrine into oblivion. In its place, a new test has arisen. "Since two governments have authority within the same territory, neither, through its power to tax, can be allowed to cripple the operations of the other. Therefore, state and federal governments must avoid exactions which *discriminate* against each other or *obviously interfere* with one another's operations."[16] [Italics sup-
148 plied.] Or, as Mr. Justice Roberts put it in his dissent in James v. Dravo, supra, a tax is valid if it bears upon an independent contractor, does not discriminate, and is not so burdensome as seriously to *interfere* with governmental functions.[17]

[9] Wheat. 316.
[10] 302 U. S. 134.
[11] See statement of Mr. Justice Roberts (dissenting) in James v. Dravo Construction Co., supra, at page 164.
[12] Panhandle Oil Company v. Miss. ex rel. Knox, 277 U. S. 218, 223.
[13] In his concurring opinion in Graves v. New York ex rel. O'Keefe, 306 U. S. 466, Mr. Justice Frankfurter characterized the dictum as a "seductive cliché."
[14] 306 U. S. 466.
[15] — U. S. —, 62 S. Ct. 43. In this case a contractor erected an army camp under a cost-plus contract and the court upheld a tax on the sale of materials which was, therefore, ultimately paid by the United States. In a companion case, a "use" tax was also upheld. Curry v. United States, — U. S. —, 62 S. Ct. 48.
[16] Mr. Justice Frankfurter in Graves v. New York ex rel. O'Keefe, supra, at page 488.
[17] He also points out (p. 172) in this dissenting opinion that the Solicitor General (now Mr. Justice Reed) filed a Brief advocating that "A nondiscriminating state tax

The Milk Control Law is not directed against the Indiantown Gap Reservation. If the objects of the law are realized, the Reservation will benefit in common with the community in general. Conversely, as already pointed out, if dealers are to be free to ignore the law in dealing with the Reservation, the whole plan will suffer proportionately. The Reservation can buy milk as others buy milk and at any price which competition may fix, not lower than the established minimum. There is no burden upon it which does not likewise fall upon all users of milk, including institutions of this Commonwealth. See Zeuger Milk Co., v. Pittsburgh School District, supra. No attempt is made in the law or in the Order of the Board to give any order or direction to the Reservation or its officers. The incidence of the law is upon dealers of milk. Although enforcement of the law against such dealers affects the price of milk to the Reservation as to others, yet that result is in its nature incidental. See Milk Control Board v. Gossello's Dairy Co., 301 Mass. 174, 16 N. E. (2d) 641, 643. Other statutes regulating the quality and 149 providing for the inspection of milk are of similar effect.

All safety and health laws, of which the Wage Law [18] is an example, increase prices. And since the King & Boozer Case, supra, such laws are not deemed invalid, even though the increased cost is directly passed on to the government.

That the test of constitutionality in cases involving police regulations is the same as in tax cases seems clear and is apparently conceded on all sides. Baltimore & Annapolis R. R. v. Lichtenberg, 176 Md. 383, 4 A. (2d) 734, appeal dismissed, 308 U. S. 525, 60 S. Ct. 297; also, Stewart & Co. v. Sadrakula, 309 U. S. 94. A tax on materials, to be added to cost and passed on to the government, imposes a burden no less direct than that imposed by a statute which fixes the minimum price to be charged by an independent contractor selling milk to the government. The government is, by the law, compelled to pay a demonstrably higher price in both instances. And we hold that, since the prices fixed are in no way discriminatory and are not such a burden as to interfere with the functioning of the federal government, they are valid. As Mr. Justice Holmes said, "* * * when the government comes into a state to purchase, I do not perceive why it should be entitled to stand differently from any other purchaser." [19] In the absence of prohibitive federal legislation, we are unwilling to disturb an enactment so well designed to provide for a local need.

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is to be judged not by the 'burden' it imposes, but by the extent of its 'interference' with 'the functioning of government.' Although Mr. Justice Roberts did not subscribe to the new test, it is interesting to note that he did not dissent in either Graves v. New York ex rel. O'Keefe, nor in the King & Booker Case.

[18] Act of 1937, May 27, P. L. 917; 43 PS 331.

[19] Panhandle Oil Case, at p. 224.

Nor do we think the law interferes with the government's policy of competitive bidding. Spahn v. Stewart, 268 Ky. 97, 103
150 S. W. (2d) 651. The applicable statutes (U. S. Revised Statutes, Sec. 3709, 41 U. S. C. A. Sec. 5; 10 U. S. C. A. Secs. 1200 and 1201) provides merely that contracts for the purchase of supplies for the government shall be made after public notice and shall be awarded to the "lowest responsible bidder for the best and most suitable article." As pointed out in United States v. Brookridge Farm, Inc., 111 F. (2d) 461, 463 (C. C. A. 10th), "The purpose of these statutes and regulations is to give all persons equal right to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition." The Milk Control Law contravenes neither the language of the statutes nor any of the above stated purposes. It does no more than put all bidders on an equal footing with regard to the minimum price and as we have already pointed out, its primary purpose is to assure *responsibility* with all that the word implies.

In No. 314 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant. In No. 3 October Term, 1942, the appeal of the United States, which intervened in the court below in the case represented by the appeal to No. 314 October Term, 1941, is dismissed.

Rhodes, J., dissents.

[File endorsement omitted.]

[Title omitted.]

151 In the Superior Court of Pennsylvania

Dissenting opinion

Filed March 3, 1942

RHODES, J.

I would reverse the order of the court below. Penn Dairies, Inc., the appellant, at the invitation of the Quartermaster of the United States Army, submitted a bid for furnishing bottled milk to the army at Indiantown Gap, Pa., for the months of March, April, and May 1941. As low bidder appellant was awarded the contract to supply by daily deliveries, during such period, 540,000 half-pint bottles, and 135,000 quart bottles of milk. The only ground for this action was the alleged violation of the commission's minimum price schedules in its general order No. A-14. There is a stipulation as to facts and evidence. Paragraphs 1, 2, and 3 of the stipulation relate to admitted facts, and paragraphs 4, 5, 6, 7, 8, and 9 state what shall be considered as evidence of respondent (appellant here). In my opinion, this

distinction is not especially material in this proceeding. There was no contradictory evidence. It seems too manifest to admit of any argument that if the commission's minimum price order applies in this case there could have been, as a matter of fact, no real competitive bidding. That was required in this case by acts of Congress. 41 U. S. C. A. § 5; 10 U. S. C. A. §§ 1191–
152 1225. It does not appear to have been within any exception to the requirement. Paragraphs 8 and 9 of the stipulation read:

"8. The profit which respondent [appellant here] would realize from the sale of the quantities covered by said contract, if sold at prices fixed by said order, would be a profit materially in excess of any margin of profit necessary to maintain stability in the milk industry.

"9. The margin of profit which the respondent [appellant here] will realize under the said contract is adequate for respondent's purposes and to maintain stability in the industry."

A minimum price materially in excess of that necessary to afford stability to the milk industry and to give a reasonable margin of profit to the dealer would certainly eliminate competitive bidding. No one will believe that any responsible dealer who was capable of complying with the contract would bid, as a practical matter, above the fixed minimum. All responsible bids would be at the fixed minimum, and consequently the effect of the commission's minimum price order would be to prevent the free competition which the market would warrant for such a quantity of milk.

For the disposition of this appeal, I do not consider it necessary to decide the constitutional questions which have been raised, or determine the power of the commission as applied to the facts in this case. It is sufficient to refer to the conclusion, which I think is erroneous, in the majority opinion that the commission, on February 15, 1941, had issued an order which applied to this sale to the United States Government. I agree with appellant's argument that the commission's general order contains no schedule which can properly be applied to this contract; that such a contract was not contemplated when the general order was formulated; and
153 that the effort of the commission to apply schedules intended for widely different situations is arbitrary, unreasonable, and unjustified. The stipulation entered into between the parties recited in considerable detail the saving to appellant in performing its contract with the United States Government made possible by the quantity of milk to be delivered.[1] The majority opinion attacks this stipulation on the ground that it is indefinite, and finds difficulty in interpreting the terms, "ordinary circumstances," and "ordinary conditions." I think the meaning is clear for the purposes of this controversy; and what was meant does not appear

[1] See stipulated and admitted facts (28a, 29a).

to be disputed by the commission. The terms were intended to designate the usual course of appellant's business with reference to all its other sales of milk. It was agreed in the stipulation that this was "the largest quantity of milk to be delivered by a single seller to a single purchaser, or for delivery in quantity lots, known to the respondent or to the commission." The suggestion in the majority opinion that under the circumstances a more useful comparison could have been made with "the cost of servicing other *large* consumers, such as hotels, restaurants, hospitals and other large institutions" is not convincing, and I think it is inapplicable. No milk contract of this magnitude has been known in Pennsylvania before. Appellant therefore drew a comparison with all of the remainder of its business, the subject matter of the commission's ordinary exercise of its authority, to demonstrate the conclusion which the commission in the stipulation conceded thus: "The profit which respondent would realize from the sale of the quantities covered by said contract, if sold at prices fixed by said order, would be a profit materially in excess of any margin of profit necessary to maintain stability in the milk industry." No producer would benefit from such excessive profits to the
154 dealer. In my opinion, the commission's general order No. A-14 does not cover this contract,[2] and was not intended to apply to the situation involved in this case, and the proper construction of that order makes it inapplicable to the facts which have been stipulated.

The commission's argument that if its order did not apply to the present transaction because the transaction was not described in the order then appellant should have applied to the commission as to applicable prices raises a matter which is not here involved. If there was no applicable schedule, there was no violation by appellant of the order as charged.

I would therefore reverse the order of the court below in sustaining the commission's refusal of the application for renewal of appellant's license.

[File endorsement omitted.]

155 In the Supreme Court of Pennsylvania, Eastern District

[Title omitted.]

Assignments of error of Penn Dairies, Inc.

Filed April 18, 1942

And now, April 15, 1942, Penn Dairies, appellant, by Owen P. Bricker and Harris C. Arnold, its attorneys, assigns as error the following actions of the Superior Court:

[2] This sale and purchase of milk by the Government of the United States for consumption by the Army is not within the commission's order No. A-14 establishing minimum wholesale prices "to bakeries, hotels, restaurants, hospitals, and institutions for consumption on the premises," and to schools.

1. The Superior Court erred in overruling appellants first assignment of error in that court as follows:

1. The court below erred in affirming the order of the Milk Control Commission as follows:

Order of the Commission.—And now, this 25th day of March, A. D. 1941, the application of Penn Dairies, Inc., Lancaster, Pennsylvania, the respondent herein, for a milk dealer's license for the year May 1, 1941 to April 30, 1942, inclusive, is refused for the reasons above stated (56a).

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of
156 Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

2. The Superior Court erred in overruling appellant's second assignment of error in that court, as follows:

2. The court below erred in overruling appellant's exception set forth in paragraph 8 of appeal to the Court of Common Pleas, as follows:

Exception (58a).—"The said order is unconstitutional and void and beyond the jurisdiction of the Commission, in that it attempts to interfere with and regulate a contract between appellant and the United States and to prevent performance of said contract, or to penalize appellant for making and performing it."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

157 Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

3. The Superior Court erred in overruling appellant's third assignment of error in that court, as follows:

3. The court below erred in overruling appellant's exception set forth in paragraph 9 of appeal to the Court of Common Pleas, as follows:

Exception (58a).—"The said order is an unlawful and unconstitutional interference with the raising and supporting of the armed forces of the United States."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

158 4. The Superior Court erred in overruling appellant's fourth assignment of error in that court, as follows:

4. The court below erred in overruling appellant's exception set forth in paragraph 10 of appeal to the Court of Common Pleas, as follows:

Exception (58a).—"The said order violates Article I, Section 8 of the Constitution of the United States."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

5. The Superior Court erred in overruling appellant's fifth assignment of error in that court, as follows:

5. The court below erred in overruling appellant's exception set forth in paragraph 11 of appeal to the Court of Common Pleas, as follows:

159 Exception (58a).—"The said order would prevent appellant from carrying on its lawfully established business, and would deprive it of its property and the use thereof without due process of law and contrary to the law of the land, in violation of Amendment XIV of the Constitution of the United States, Article I, Sections 1 and 9 of the Constitution of Pennsylvania."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

6. The Superior Court erred in overruling appellant's sixth assignment of error in that court, as follows:

6. The court below erred in overruling appellant's exception set forth in paragraph 12 of appeal to the Court of Common Pleas, as follows:

Exception (58a).—"The Commission erred in concluding that the actions of appellant complained of in said citation were
160 in violation of the Commission's Official General Order No. A-6 as amended, and that sale prices under said contract are in violation of any legally established minimum price applicable thereto."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

7. The Superior Court erred in overruling appellant's seventh assignment of error in that court, as follows:

7. The court below erred in overruling appellant's exception set forth in paragraph 14 of appeal to the Court of Common Pleas, as follows:

Exception (59a).—"The Commission has not established any general order or fixed any minimum re-sale price expressly, or legally or reasonably applicable to sales of milk in such quantities and under such conditions as are involved in said contract."

161 Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster Pennsylvania, the appellant, is sustained (100a).

Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

8. The Superior Court erred in overruling appellant's eighth assignment of error in that court, as follows:

8. The court below erred in overruling appellant's exception set forth in paragraph 17 of appeal to the Court of Common Pleas, as follows:

Exception (59a).—"The Commission erred in ruling that its said General Orders are applicable to sales to the United States or to an instrumentality of the United States."

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

162 Order of the Superior Court.—In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

9. The Superior Court erred in overruling appellant's ninth assignment of error in that court, as follows:

9. The court below erred in ruling that the Pennsylvania Milk Control Law confers on the Milk Control Commission authority to fix minimum prices for sales of milk to the United States, on issue raised by appellant's answer, as follows:

Answer (14a).—The Commission is without jurisdiction under the laws and constitution of Pennsylvania or under the laws and constitution of the United States to limit, regulate, control or interfere with the prices or other terms of a contract between the respondent and the United States or any agency or instrumentality thereof.

Order of the Court.—And now, July 25th, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Superior Court.—In No. 311 October Term, 163 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

10. The Superior Court erred in entering the following order: In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant.

(Signed) Arnold & Bricker.
By Harris C. Arnold.
Harris C. Arnold.
Attorneys for Appellant.

[File endorsement omitted.]

164 In the Supreme Court of Pennsylvania

[Title omitted.]

Assignments of error of the United States

Filed Apr. 17, 1942

And now, April 15, 1942, the United States of America, Appellant, Intervenor, by Gerald A. Gleeson, United States Attorney, and J. Barton Kettew, Jr., Assistant United States Attorney for the Eastern District of Pennsylvania, its attorneys, assigns as error the following actions of the Superior Court:

1. The Superior Court erred in overruling the appellant's First Assignment of Error in that Court, as follows:

The court below erred in affirming the order of the Milk Control Commission as follows:

Order of the Commission.—And now, this 25th day of March, A. D. 1941, the application of Penn Daries, Inc., Lancaster, Pennsylvania, the respondent herein, for a milk dealer's License for the year May 1, 1941 to April 30, 1942 inclusive, is refused

for the reasons above stated (56a).

165 Order of the Court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the Appellant, is sustained (100a).

Order of the Court.—In No. 3 October Term, 1942, the appeal of the United States which intervened in the court below in the case represented by the appeal to No. 311 October Term, 1941, is dismissed.

2. The Superior Court erred in overruling the appellant's Second Assignment of Error in that Court, as follows:

The court below erred in denying the second prayer of the suggestion of the interest of the United States, as follows:

Prayer (74a).—"That the court determine and declare that the Commission is without lawful power or authority to fix or regulate the minimum prices which may be charged by milk dealers in making sales of milk and milk products to the United States."

Order of the Court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's

166 license for the year beginning May 1, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Court.—In No. 3 October Term, 1942, the appeal of the United States which intervened in the Court below in the case represented by the appeal to No. 311 October Term, 1941, is dismissed.

3. The Superior Court erred in overruling the appellant's Third Assignment of Error in that Court, as follows:

The court below erred in denying the third prayer of the suggestion of the interest of the United States as follows:

Prayer (74a).—"That the court declare the order herein appealed from, by the Penn Dairies, Inc., ineffective, unconstitutional and void."

Order of the Court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Court.—In No. 3 October Term, 1942, the appeal of the United States which intervened in the court below in the case represented by the appeal to No. 311 October Term, 1941, is dismissed.

167 4. The Superior Court erred in overruling the appellant's Fourth Assignment of Error in that Court, as follows:

The court below erred in denying the fourth prayer in the suggestion of the interest of the United States as follows:

Prayer (74a).—"That the court remit said order to the Commission with directions that it be revoked."

Order of the Court.—And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941, and ending April 30, 1942, to Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained (100a).

Order of the Court.—In No. 3 October Term, 1942, the appeal of the United States which intervened in the court below in the case represented by the appeal to No. 311 October Term, 1941, is dismissed.

5. The Superior Court erred in overruling the appellant's Fifth Assignment of Error in that Court, as follows:

In entering the following Order: In No. 3 October Term, 1942, the appeal of the United States which intervened in

168 the Court below in the case represented by the appeal to No. 311 October Term, 1941, is dismissed.

(Signed) GERALD A. GLEESON,
Gerald A. Gleeson,
United States Attorney.
J. BARTON RETTEW, JR.
J. Barton Rettew, Jr.,
Assistant United States Attorney.

[File endorsement omitted.]

169 In the Supreme Court of Pennsylvania,
Eastern District

[Title omitted.]

Opinion of the Court

Filed May 25, 1942

Per Curiam:

These appeals are from the judgments of the Superior Court, which affirmed an order of the Court of Common Pleas of Lancaster County. We have carefully considered each question raised and find that they were all correctly and ably disposed of by the learned Superior Court. It would be idle repetition to restate the facts and law of the case. We therefore affirm the judgments on the comprehensive opinion of Judge Kenworthey, reported in — Pa. Superior Ct. —.

Judgements affirmed.

[File endorsement omitted.]

170 In the Supreme Court of Pennsylvania,
Eastern District

[Title omitted.]

Petition for allowance of appeal

Filed July 27, 1942

The United States of America and Penn Dairies, Inc., petitioners herein, respectfully state that on May 25, 1942 this Court entered judgment against them affirming the judgment of the Superior Court.

Petitioners, believing that the judgment of this Court is incorrect, pray that they may be allowed to appeal to the Supreme Court of the United States for reversal of the judgment of this

Court and that a transcript of the Record in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Petitioners submit and present to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause.

THE UNITED STATES OF AMERICA,
By CHARLES FAHY, *Solicitor General.*
GERALD A. GLEESON,
United States Attorney.

PENN DAIRIES, INC.
By HARRIS C. ARNOLD, *Attorney.*

Dated 17 July 1942.

171 [File endorsement omitted.]

224 In the Supreme Court of Pennsylvania

[Title omitted.]

Order allowing appeal

Filed Aug. 8, 1942

And now, August 8th, 1942, it is ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Pennsylvania in the above-entitled case, as provided by law, and it is further ordered that the Prothonotary of the Supreme Court of Pennsylvania shall prepare a certified transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within forty days of this date.

And it is further ordered that security for costs on appeal and to act as a supersedeas be fixed in the sum of $500.00.

WM. I. SCHAFFER,
Chief Justice of the
Supreme Court of Pennsylvania.

[File endorsement omitted.]

225 In the Supreme Court of Pennsylvania

[Title omitted.]

Assignment of errors

Filed July 27, 1942

The Court erred.

1. In holding that the Pennsylvania Milk Control law (Act of April 28, 1937, P. L. 417) is constitutional in so far as it

authorized the Pennsylvania Milk Control Commission to fix minimum prices for sales of milk in Pennsylvania to the United States.

2. In holding that General Order No. A-14 of the Pennsylvania Milk Commission is constitutional in so far as it prescribes minimum prices for sales of milk in Pennsylvania to the United States.

3. In holding that the Pennsylvania Milk Control Commission may constitutionally fix a minimum price below which a milk dealer in Pennsylvania may not sell or contract to sell milk to the United States.

4. In failing to hold that the Act and Order contravened Article 1, Section 8 of the Constitution of the United States because they constitute a direct interference with the procurement of supplies by the United States Army.

5. In failing to hold that the Act and Order are unconstitutional because, contrary to Article 6 of the Constitution of
226 the United States, they interfere and conflict with the competitive bidding statutes of the United States. R. S. 3709 (41 U. S. C. 5); Act of July 5, 1884, c. 217, 22 Stat. 108; 109; Act of June 30, 1902, c. 1328, 32 Stat. 507, 514 (10 U. S. C. 1200–1201).

6. In failing to hold that the Act and Order are unconstitutional because they constitute an attempt on the part of the State to exercise supervision and control over the contracts of the United States.

7. In failing to hold that the Act and Order are unconstitutional because they attempt to regulate the terms upon which the United States may contract with its own citizens.

8. In failing to hold that the Act and Order are unconstitutional because they deprive Penn Dairies, Inc., of its license without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

9. In affirming the judgment of the Superior Court of Pennsylvania.

(Signed) THE UNITED STATES OF AMERICA,
By CHARLES FAHY,
Solicitor General.
GERALD A. GLEESON,
United States Attorney.
PENN DAIRIES, INC.
By HARRIS C. ARNOLD,
Harris C. Arnold.

[File endorsement omitted.]

228 [Citation in usual form showing service on Frank E. Coho, omitted in printing.]

229 In the Supreme Court of Pennsylvania

Designation of record

Filed Aug. 18, 1942

To Honorable CHARLES A. WATERS,
Prothonotary of the Supreme Court of Pennsylvania:

On appeal of the United States of America and Penn Dairies, Inc. to the Supreme Court of the United States, in the above cases, you will incorporate in the transcript, the following portions of the record:

1. The Record as printed and used at argument in the Supreme Court of Pennsylvania in Nos. 173 and 180, January Term, 1942.
2. Assignments of Error in the Superior Court, No. 311, October Term, 1941 and No. 3 October Term, 1942.
3. All Opinions in the Superior Court.
4. Docket Entries Supreme Court of Pennsylvania in Nos. 173 and 180 January Term, 1942.
5. All Assignments of Error in Supreme Court of Pennsylvania (both cases).
6. Opinion of the Supreme Court (both cases—one opinion).

230 7. Petition for and allowance of Appeal to the Supreme Court of the United States and jurisdictional statement.

8. Assignments of Error on Appeal to the Supreme Court of the United States.
9. This Praecipe.

THE UNITED STATES OF AMERICA,
By GERALD A. GLEESON,
United States Attorney.
HARRIS C. ARNOLD.

AUGUST 13, 1942.

On behalf of the appellee, I hereby accept service of the foregoing praecipe.

(Signed) FRANK E. COHO,
Deputy Attorney General of Pennsylvania
of counsel for Milk Control Commission
of Pennsylvania, appellee.

[File endorsement omitted.]

231 [Bond on Appeal for $500.00 approved and filed Aug. 8, 1942; omitted in printing.]

241 [Clerk's certificate to foregoing transcript omitted in printing.]

242 [Chief Justice's certificate to Clerk omitted in printing.]

[Clerk's certificate to Chief Justice, omitted in printing.]

243 In the Supreme Court of the United States,
October Term, 1942

[Title omitted.]

Statement of points relied upon and designation of record for printing

Filed Oct. 7, 1942

Pursuant to rule 13, paragraph 9 of this Court, the appellants state that they intend to rely on all of the points in their assignments of errors.

The appellants deem the entire record, as filed in the above entitled cause, with the exception of the material contained in pages 109 to 117 of the transcript of record, necessary for the consideration of the points relied upon.

THE UNITED STATES OF AMERICA,
By CHARLES FAHY,
Charles Fahy,
Solicitor General.

PENN DAIRIES, INC.
By HARRIS C. ARNOLD,
Harris C. Arnold,
Attorney.

247 Supreme Court of the United States

[Title omitted.]

Order noting probable jurisdiction

October 26, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is assigned for argument immediately following No. 278.

[Endorsement on cover:] File No. 46900. Pennsylvania, Supreme Court. Term No. 399. Penn Dairies, Inc., and The United States of America, Appellants vs. The Milk Control Commission of the Commonwealth of Pennsylvania. Filed September 15, 1942. Term No. 399 O. T. 1942.

U. S. GOVERNMENT PRINTING OFFICE 1942

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CHARLES ELMORE CROPLEY
CLERK

No. 399

In the Supreme Court of the United States

OCTOBER TERM, 1942

PENN DAIRIES, INC., AND THE UNITED STATES OF AMERICA, APPELLANTS

v.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

In the Supreme Court of Pennsylvania

EASTERN DISTRICT

January Term 1942, No. 173. (Appeal of Penn Dairies, Inc., in which the United States has intervened)

January Term 1942, No. 180. (Appeal of the United States)

PENN DAIRIES, INC., APPELLANT, THE UNITED STATES OF AMERICA, INTERVENOR-APPELLANT

v.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, the United States of America and Penn Dairies, Inc., herewith submit their statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause. The date of the judgment entered by the Supreme Court of Pennsylvania is May 25, 1942. The petition for appeal is dated July 17, 1942. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment complained of is conferred by Section 237 (a) of the Judicial Code as

amended by the Act of February 13, 1925. The following cases are believed to sustain the jurisdiction of the Supreme Court: *Standard Oil Co. of Calif.* v. *Johnson, Treasurer of the State of Calif.*, No. 1125, decided June 1, 1942; *United States* v. *Klein*, 303 U. S. 276; *Nebbia* v. *New York*, 291 U. S. 502; *Johnson* v. *Maryland*, 254 U. S. 51.

STATE STATUTE INVOLVED

The statute of the Commonwealth of Pennsylvania which was held to be valid but which the appellants contended was unconstitutional and in conflict with the laws of the United States is the Milk Control Law of Pennsylvania, Act of April 28, 1937, P. L. 417 (31 PS Sec. 700j, 101 et seq.), particularly Section 802 of said Act, which is as follows:

> SECTION 802. *Wholesale and retail prices.*—The commission shall fix, by official order (except as hereinafter provided in this section), the minimum wholesale and retail prices, and may fix, by official order, the maximum wholesale and retail prices, to be charged for milk sold within any milk marketing area of the Commonwealth, wheresoever produced, including milk sold by:
>
> (1) Milk dealers to other milk dealers;
>
> (2) Milk dealers to consumers;
>
> (3) Milk dealers to stores, either for consumption on the premises or resale to consumers;

(4) Stores to consumers, except for consumption on the premises where sold.

Nothing herein contained shall be construed to empower the commission to fix the price at which milk may be sold by any milk dealer or producer to consumers for consumption on the premises of such milk dealer or producer.

The fixing of minimum wholesale or retail prices for skimmed milk, condensed or concentrated whole or skimmed milk, bulk cream handled between milk dealers other than stores, and ice cream mix, shall be discretionary with the commission.

And also Section 404 (10) of said Act, which is as follows:

SECTION 404. *Grounds for refusal, suspension or revocation.*—The commission shall grant a license to an applicant complying with the provisions of this act and the rules, regulations, and orders issued by the commission pursuant thereto. The commission may decline to grant a license to an applicant, or may suspend, revoke, or refuse to transfer a license already granted to a milk dealer, or may prohibit a milk dealer exempted from the license requirements of this act from continuing to operate as a milk dealer, after determination by the commission that the dealer:

* * * * * *

(10) Has violated any of the provisions of this act, or any of the rules, regulations, or orders of the commission, or any stipula-

tion entered into between the said dealer and the commission in the course of any proceeding before the commission;.

THE NATURE OF THE CASE

In the Fall of 1940 the United States established a large military encampment on lands belonging to the Commonwealth of Pennsylvania at Indiantown Gap, Dauphin County, Pennsylvania. Thereafter, the Purchasing and Contracting Officer of the Quartermaster of the United States Army at Indiantown Gap solicited competitive bids to supply milk to the post during the months of March, April, May, and June 1941 (R. 48a–52a).

The Milk Control Commission of Pennsylvania had therefore promulgated the general order fixing minimum retail prices of fluid milk (R. 30a–43a). Upon the issuance of the invitations to bid the Commission advised local dealers that its order was applicable to the sale of milk to the United States and that the schedules of rates in its general order fixed the minimum prices below which no Pennsylvania milk dealer could sell milk to the United States (R. 10a–13a). Penn Dairies, Inc., a Pennsylvania corporation having its principal office in the City of Lancaster, Pennsylvania, was the lowest bidder (R. 70a). It was awarded the contract which called for the delivery of 540,000 half-pint bottles and 135,000 quart bottles at contract prices of $0.0215 per half-pint bottle and $0.079 per quart bottle, which prices were lower

than the minimum prescribed by the Milk Commission (R. 53a).

Acting under Section 404 of the Milk Control Law the Commission, after a citation and hearing, refused to renew the milk dealer's license of Penn Dairies, Inc., for the year beginning May 1, 1941. The refusal was based solely on the fact that Penn Dairies had contracted to sell and had sold milk to the United States at prices below the minimum prices fixed by the Commission (R. 54a). Penn Dairies appealed to the Court of Common Pleas of Lancaster County, Pennsylvania, from the order refusing the renewal of its license[1] (R. 56a–60a).

In the action in the Court of Common Pleas the United States filed a Suggestion of Interest (R. 69a–74a), was allowed to intervene (R. 83a) and has participated in the litigation continuously since its intervention. On July 25, 1941, the Court of Common Pleas affirmed the order of the Commission (R. 100a). On March 23, 1942, the Superior Court of Pennsylvania affirmed the judgment of the Court of Common Pleas. On May 25, 1942, the Supreme Court of Pennsylvania affirmed the judgment of the Superior Court.

[1] With that appeal and each subsequent appeal there has been a *supersedeas*. By reason of the orders of *supersedeas* the Commission, acting under Section 406 of the Milk Control Law, has successively issued conditional licenses to appellant for the years beginning May 1, 1941, and May 1, 1942, which licenses are by law automatically cancelled five days after the termination of the litigation favorably to the

THE FEDERAL QUESTIONS AND THE RULINGS THEREON

The appellants contended below

(1) That if the price control features of the Milk Control Law and the Orders of the Milk Control Commission issued thereunder should be construed to apply to milk purchased by the United States then the Act is unconstitutional in that it constitutes a direct interference with the sovereign right of the United States to contract for the purchase of supplies for the Army upon such terms as it sees fit, free from all State interference or control as to the terms and substance of the contract and that the Act constitutes an unconstitutional interference with Penn Dairies' correlative constitutional right to deal with the United States; and

(2) That the Act and the Orders issued pursuant thereto effectually precluded real competitive bidding and therefore conflict with the Federal statutes which require Army supplies to be purchased on competitive bids.

The first question was raised before the Milk Control Commission in the Answer of Penn Dairies, Inc., to the citation of the Commission (R. 14a–15a) and in the Petition of Penn Dairies before the Court of Common Pleas (R. 58a). Both questions were raised in the Court of Common Pleas by the Suggestion filed by the United States (R. 72a–74a) and in the Superior Court of Pennsylvania and in the Supreme Court of

Pennsylvania by assignment of error, by brief and by argument.

The issues so raised were squarely passed upon by each of the lower courts and were decided adversely to the contention of the appellants by each of the lower tribunals (Op. of Milk Comm., R. 54a, Op. of Ct. of Common Pl as, R. 85a–94a, 97a–100a). The Superior Court stated that the questions before it were:

> (1) Whether the Milk Control Law authorizes the Milk Control Commission to fix minimum prices for the sale of milk to the United States; (2) Whether there was, on February 15, 1941, any order of the Commission which, when properly construed, applied to such sales; and (3) If these questions are answered in the affirmative, whether the law, and the order issued pursuant to it, cast an unconstitutional burden upon the Government.

After answering the first two questions in the affirmative, the Superior Court in deciding the third question said:

> * * * And we hold that since the prices fixed are in no way discriminatory and are not such a burden as to interfere with the functions of the federal government, they are valid. As Mr. Justice Holmes said, "* * * when the Government comes into a State to purchase, I do not perceive why it should be entitled to stand differently from any other purchaser." In the absence

> of prohibitive federal legislation, we are unwilling to disturb an enactment so well designed to provide for a local need.
>
> Nor do we think the law interferes with the Government's policy of competitive bidding * * *. The Milk Control Law contravenes neither the language of the statutes nor any of the above-stated purposes. It does no more than to put all bidders on an equal footing with regard to the minimum price and as we have already pointed out, its primary purpose is to assure *responsibility* with all that the word implies.

The Supreme Court of Pennsylvania affirmed, saying:

> It would be idle repetition to restate the facts and the law of the case. We therefore affirm the judgments on the comprehensive opinion of Judge Kenworthey, reported in — Pa. Sup. Ct. —.

THE QUESTION IS ONE OF SUBSTANCE

The constitutional questions decided by the Supreme Court of Pennsylvania are substantial and important. The United States, particularly at the present time, maintains and operates large numbers of camps, stations, posts, and military fields of various character. These posts, wherever located in the continental United States, are necessarily within the territorial limits of the various States, and the supplies of food required for the maintenance of the forces stationed at such posts, especially such products as fresh milk, must be ob-

tained from the area contiguous to the posts. Legislation seeking to control the minimum prices which distributors must charge for fluid milk is in effect in a number of States,[2] and in at least three States other than Pennsylvania the state boards have held that sales to the United States come within the intendment of the statutes.[3] Both from the standpoint of the United States and from that of the distributors it is of the utmost importance to learn if the distributors must comply with the minimum prices fixed by State Boards in bidding upon Federal supply contracts.

The state statute as construed by the Milk Commission and approved by the Supreme Court of Pennsylvania constitutes a deliberate attempt to regulate federal functions beyond the reach of valid state authority. As disclosed by the bulletin issued by the Milk Control Commission on Febru-

[2] Alabama, No. 164, Laws of 1939; Connecticut, Gen. Stat. Supp. 1935, Sec. 801 (c); Florida, Comp. Gen. Laws Anno. 1940 Sup., Sec. 3219 (50); Georgia, Code of Ga. Ann. Title 42, Sec. 552; Maine, Laws of 1935, c. 13; Montana, revised Code Ann. 1939 Supp., Sec. 2640.7; New Hampshire, Laws of 1937, c. 107; Oregon Laws of 1939, c. 197; Rhode Island, Laws of 1940, c. 899; Vermont, Laws of 1937, No. 99, Virginia, 1934 Laws, c. 357.

[3] Substantially the same questions are involved in the case of *Pacific Coast Dairy, Inc.*, v. *Department of Agriculture of California*, 123 Pac. (2d) 440, now pending in the Supreme Court of the United States on appeal from the Supreme Court of California. See also *Milk Control Board* v. *Gosselin's Dairy, Inc.*, 301 Mass. 174; *Patterson Milk & Cream Co.* v. *Milk Control Board*, 118 N. J. L. 383.

ary 4, 1941 (R. 10a–13a), specific attention was called to the invitation of the United States for bids on the supplies of milk here involved. Certain information was given to the dealers and the Commission expressly stated in respect of the proposed purchase (R. 12a):

> Any purchases or sales of milk made or offers to buy or sell milk below the prescribed minimum prices of the effective general orders of this Commission are construed as violations of the Milk Control Law.

It is clear, therefore, that the statute as construed and applied by the Milk Commission and by the courts of Pennsylvania was intended to regulate and control the prices which the United States would be compelled to pay for fluid milk.

The constitutional infirmity of the statute as construed seems clear. The States are without power to prescribe the conditions on which private citizens may contract with the Federal Government. Cf. *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 867; *Crandall* v. *Nevada*, 6 Wall. 35, 44; *Arizona* v. *California*, 283 U. S. 423, 451–452; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 156; *Stewart Co.* v. *Sadracula*, 309 U. S. 94, 103–104. And the particular conditions prescribed by the statute and order would seem to conflict with the Federal enactments requiring competitive bidding in the letting of contracts for furnishing of supplies. R. S. 3709 (41 U. S. C.

5), Act of July 5, 1884, c. 217, 22 Stat. 108, 109; Act of June 30, 1902, c. 1328, 32 Stat. 507, 514 (10 U. S. C. 1200–1201).

The cases relied upon by the Pennsylvania courts are not controlling. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, and *Graves* v. *O'Keefe*, 306 U. S. 466, are cases involving taxes which were imposed by state authority and which were to be borne by individuals. The legal incidence of the tax was upon the individuals and the tax could be either absorbed by the taxpayer or passed on. The burden which the United States might be compelled to bear in the future was properly determined to be so indirect as to constitute no impairment of federal functions. In *Alabama* v. *King & Boozer*, 314 U. S. 1, the direct legal incidence of the tax was placed upon King & Boozer and it was only the government's voluntary assumption of such taxes by contract that resulted in the burden of the tax ultimately resting upon the United States. In none of these cases was there any interference with the policy in operation of the federal competitive bidding statutes. The legal and practical incidence of the price regulation here involved, however, is necessarily on the buyer and seller alike and the regulation directly interferes with the enforcement of the competitive bidding statutes.

There are appended hereto copies of the opinions of the Supreme Court of Pennsylvania, of

the Superior Court of Pennsylvania, of the Court of Common Pleas of Lancaster County, Pennsylvania, and of the Milk Control Commission.

THE UNITED STATES OF AMERICA,
By CHARLES FAHY,
Charles Fahy,
Solicitor General.

GERALD A. GLEESON,
Gerald A. Gleeson,
United States Attorney.

PENN DAIRIES, INC.,
By HARRIS C. ARNOLD,
Harris C. Arnold,
Attorney.

OPINION OF THE COURT

(Filed May 25, 1942)

Per Curiam:

These appeals are from the judgments of the Superior Court, which affirmed an order of the Court of Common Pleas of Lancaster County. We have carefully considered each question raised and find that they were all correctly and ably disposed of by the learned Superior Court. It would be idle repetition to restate the facts and law of the case. We therefore affirm the judgments on the comprehensive opinion of Judge Kenworthy, reported in — Pa. Superior Ct. —.

Judgments affirmed.

OPINION OF THE SUPERIOR COURT

(Filed March 3, 1942)

Opinion by Kenworthey, J.

The questions are: (1) Whether the Milk Control Law[1] authorizes the Milk Control Commission to fix minimum prices for the sale of milk to the United States; (2) whether there was, on February 15, 1941, any order of the Commission which, when properly construed, applied to such sales; and (3) if these questions are answered in the affirmative, whether the law, and the order issued pursuant to it, cast an unconstitutional burden upon the government.

The facts are virtually undisputed. On February 1, 1941, the government purchasing officer, at Indiantown Gap, sent to various milk dealers, including defendant,[2] invitations to bid on the milk requirements for the Army reservation located there. The requirements called for the delivery of 135,000 one-quart bottles and 540,000 half-pint bottles between March 1st and June 30,

[1] Act of April 28, 1937, P. L. 417, 31 PS 700j.

[2] Penn Dairies, Inc., for convenience, will be referred to as "defendant" in spite of the fact that Section 904 provides: "The appeal provided by this article from action of the Commission shall be by petition against the Commission, officially as defendant." This case was started by a citation against Penn Dairies, Inc., in which it was the defendant.

1941. On February 4, 1941, the Milk Control Commission promulgated a notice "To All Milk Dealers Interested in Submitting Bids to Furnish Milk to the United States Government at Indiantown Gap", one of which went to defendant. Accompanying the notice, were copies of the orders which the Commission deemed applicable. The notice indicated the minimum price to be $0.095 per bottle for the milk sold in quarts and $0.025 for that sold in half-pints, and the notice closed with a warning that any sales at prices below the prescribed minimums would be construed as violations of the law. The notice, except for the tabulation of specifications, is printed in the margin.[3] On February 15, 1941, the bids were opened and the contract awarded defendant as the lowest bidder. Defendant's bid for both quantities—$0.079 for the quarts and $0.0215 for the half-pints—was below the minimums."

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[3] "The quantities for the above items are listed as the estimated quantities required for each month during the period from March 1, 1941, to June 30, 1941, inclusive.

"For your information and guidance, we are enclosing herewith a copy of our Official General Order A-14, applicable to Area No. 11, the Statewide Milk Marketing Area, in which area Indiantown Gap, Pennsylvania, is located, and direct your attention to sub-paragraph (b), Section 4, of said Order, setting forth the minimum wholesale prices to be charged by or paid to milk dealers for Grade A Milk, either raw or pasteurized; for Grade B milk, either raw or pasteurized, not exceeding 4.0% butterfat content; and for Plain Buttermilk, sold in bottles or other containers, in said Area No. 11.

"The Commission construes the Government Facility at Indiantown Gap, Pennsylvania, as a training camp or res-

On March 5, 1941, the Commission issued a citation to defendant to show cause why its application for a milk dealer's license for the year May 1, 1941 to and including April 30, 1942, should not

ervation, and as such, where milk is required in half-pint bottles or half-pint fibre containers, would be entitled to the special wholesale half-pint school prices of said Order No. A-14.

"Where milk dealers propose to furnish Grade A milk, pasteurized Grade B milk, not exceeding 4.0% butterfat content, or Plain Buttermilk, meeting Federal Specifications, the following minimum unit prices should be considered in the preparation of their bids:

Product	Unit prices	
	Quarts	Half-pints
Grade A milk either raw or pasteurized	$0.115	$0.035*
Grade B milk, either raw or pasteurized, not exceeding 4.0% butterfat content	.095	.0275*
Plain buttermilk	.07	

"The Commission suggests that milk dealers acquaint themselves with Federal Specifications for milk, particularly C-M-381B.

"Any purchases or sales of milk made or offers to buy or sell milk at prices below the prescribed minimum prices of effective Official General Orders of this Commission are construed as violations of the Milk Control Law.

"The Milk Control Commission expects compliance with its orders, rules, and regulations, and will appreciate your cooperation in this matter.

*Includes service charges for ice, straws, or special boxes. If these services are not rendered, these prices may be reduced by $0.0025 per half-pint.

"Commonwealth of Pennsylvania
Milk Control Commission,
Edwin H. Ridgway,
Secretary."

be refused. The sole ground alleged was the aforesaid violation of its Order. Defendant, by answer, raised the questions which are now before this court. The Commission, having refused the license in an order which, on appeal, was sustained by the Court of Common Pleas, defendant took this appeal.

First: Does the Milk Control Law authorize the Commission to fix minimum prices for milk sold to the government?

The Act, Section 802, provides: "The Commission shall fix . . . . the minimum wholesale and retail prices . . . . to be charged for milk sold within any milk marketing area of the Commonwealth wheresoever produced, *including* milk sold by: 1. milk dealers to other milk dealers; 2. milk dealers to consumers; 3. milk dealers to stores . . . .; 4. stores to consumers . . . ." [Italics supplied.] Conceding, arguendo, that the government is not included in any of the enumerated classes, the question is whether "including" is a word of limitation—whether it means "including only". It is sometimes thus used; it is perhaps more often used as a word of extension or enlargement.[1] "To arrive at the real meaning, it is always necessary to take a broad general view of the act,

[1] *American Surety Co.* v. *Marotta*, 287 U. S. 513, 53 S. Ct. 260; *Cannon* v. *Nicholas*, 80 Fed. (2d) 934 (C. C. A. 10th); *Weller & Weller* v. *The Grange Mutual Casualty Insurance Co.*, 105 Pa. Superio. Ct. 547, 161 A. 615; *McGlathery's Estate*, 311 Pa. 351, 166 A. 886.

so as to get an exact conception of its aim, scope and object." *Keating* v. *White, et al.*, 141 Pa. Superior Ct. 495, 504, 15 A. (2d) 396; *Statutory Construction Act* of May 28, 1937, P. L. 1019, 46 PS 551, 554, 563. The purpose of the law (Sec. 101) is to regulate and control the milk industry "for the protection of the public health and welfare and for the prevention of fraud". Section 801 provides: "The Commission shall base all prices upon all conditions affecting the milk industry in each milk marketing area, including the amount necessary to yield a reasonable return to the producer and to the milk dealer." As Mr. Justice Stern said in *Rieck-McJunkin Dairy Company* v. *Milk Control Commission*, 341 Pa. 153, 157, 18 A. (2d) 868: "The main purpose of the Milk Control Law [is] to insure a sufficient supply of wholesome milk, which cannot be accomplished unless, as the preamble of the act recites, 'the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk,' . . . ." Although the prices to all classes of producers or dealers need not be the same, it is apparent that, in order to carry out the purpose of the law, the price fixing power must extend to *all* sales of milk by both producers and dealers. If these purposes are carried out, the legislation will inure to the benefit of the government as a part of a community within the Commonwealth, as well as to

other consumers. On the other hand, if the policy of the law is not carried out as to the largest single buyer, the purpose may be frustrated. The Supreme Court has held that the provisions of the law apply to a governmental subdivision of this Commonwealth. *Zeuger Milk Co. v. Pittsburgh School District*, 334 Pa. 277, 5 A. (2d) 885. We hold that the Legislature intended the Commission to have the power to regulate the prices of sales to the United States, provided it is not unconstitutional.[5] And, in view of this conclusion, it is not necessary to consider whether the government is a "consumer" as defined in the act.

Second. Had the Commission, on February 15, 1941, issued any order fixing the minimum price of sales to the government for consumption at an army camp?

The Commission contends that the price was fixed by Official General Order No. A-6, as amended by A-14.[6] The order provided wholesale prices for sales by "milk dealers to other milk dealers and to stores for resale; and to bakeries,

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[5] The Statutory Construction Act of May 28, 1937, P. L. 1019, Article IV, Sec. 52, 46 PS 552, provides that in construing an act, the courts shall presume: "(3) That the Legislature does not intend to violate the Constitution of the United States or of this Commonwealth."

[6] "(B) Minimum Wholesale Prices. Milk dealers to other milk dealers and to stores for resale; and to bakeries,

hotels, restaurants, hospitals and *institutions*. . . ." special provision for sales to schools, fixing $0.0275 (Italics supplied.) The price fixed for Grade B milk not exceeding 4% butterfat, is $0.095 for quarts and $0.025 for half-pints. But there is a for half-pints. It is to be noted that, for the sales of half-pints, the Commission allowed the lowest price on the schedule. Defendant admits the Indiantown Gap Military Reservation is an institution.[7] Defendant argues that, because of the unprecedented size of the contract—it was conceded to have been the largest single order for milk ever given in this Commonwealth—the cost to it of servicing the contract would be considerably reduced, that it could make a reasonable profit and

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hotels, restaurants, hospitals, and institutions for consumption on the premises:

Product	Unit price		
	Quart	Pint	Half-pint
Grade "A" Milk	$0.115	$0.06	$0.035
Grade "B" Milk:			
Exceeding 4.0% B. F.	.095	.06	.035
Not exceeding 4.0% B. F.	.085	.05	.035
Grade "B" Milk to Schools, not exceeding 4.0% B. F.			.0275
Cream Buttermilk, Chocolate Milk and other flavored Milk or Milk Drink containing more than 0.5% Butterfat.	Same as Grade "B" Milk Exceeding 4.0% Butterfat.		
Skim Milk	.06		
Buttermilk—Plain	.07	.05	.03
	(One Gallon, Single Container, Single Delivery, $0.25)"		

[7] The citation averred: "6. Indiantown Gap, a United States Military Reservation, is an institution of the United States for military training," and this averment was admitted in the corresponding paragraph of the answer.

maintain the price to the producers with a lower return, and that it is, therefore, unreasonable to suppose that the Commission intended the prices in Order A–14 to apply. The principal difficulty with this contention, as we see it, is that the evidence offered does not support it. Defendant offered, by stipulation,* figures to show "its average bottle breakage and losses where milk is served under ordinary conditions" as compared to losses from similar causes under the contract, there being an alleged difference of 2%. In the same manner, it offered evidence to show that "under ordinary circumstances delivery of the same quantity of milk would require a large number of trucks and drivers" and that, under the contract, there was a saving of delivery cost on each bottle of $0.0005. But there is nothing to indicate what the "ordinary circumstances" or the "ordinary conditions" were. Obviously, the difference in the cost of servicing a thousand customers is materially larger than the cost of servicing one. But the cost

* The stipulation was in two parts. It provided that paragraphs 1, 2, and 3, which have no application to the present question, "shall be treated as admitted facts." It then provided: "It is further agreed that the statements in the following paragraphs shall be received in evidence as competent testimony. . . ." Although the statements in these subsequent paragraphs were not contradicted, they were obviously intended to have less weight than those in the first three and we consider that they were open to analysis and that we are not bound by the inferences defendant would draw from them.

of servicing five or ten customers may not be. The schedule of prices fixed by the Commission for this contract, being the lowest possible, the cost must be compared, if the comparison is to be used as valid argument, with the cost of servicing other *large* customers, such as hotels, restaurants, hospitals and other large institutions. If the figure offered by defendant for comparison was weighted by the cost of servicing small, individual customers, the figure is of no value whatever. And there is no indication of what, exactly, the comparison means. We hold General Order A–1, as amended by A–14, covered the sale to the government.

Third. Does the Order impose an unconstitutional burden upon the government?

The extent to which, under our dual system of government, the states may burden the operations of the federal government, has long been the subject of controversy. The Constitution does not expressly deal with it. From *McCulloch* v. *Maryland*,[9] decided in 1824, down to *James* v. *Dravo Construction Co.*,[10] decided in 1937, Chief Justice Marshall's dictum that the power to tax is the power to destroy was the prevailing doctrine. Under it, any law which imposed a demonstrable burden on the government was held to be unconstitutional.[11] But, as Mr. Justice Holmes pointed

[9] 4 Wheat. 316.

[10] 302 U. S. 134.

[11] See statement of Mr. Justice Roberts (dissenting) in *James* v. *Dravo Construction Co.*, supra, at p. 161.

out in his dissent in the *Panhandle Oil Case*,[12] "In those days it was not recognized, as it is today, that most of the distinctions of the law are distinctions of degree," and, "The power to tax is not the power to destroy while this court sits."[13] And the decisions in *Graves* v. *O'Keefe*[14] and *Alabama* v. *King & Boozer*[15] have swept the doctrine into oblivion. In its place, a new test has arisen. "Since two governments have authority within the same territory, neither, through its power to tax, can be allowed to cripple the operations of the other. Therefore, state and federal governments must avoid exactions which *discriminate* against each other or *obviously interfere* with one another's operations."[16] [Italics supplied.] Or, as Mr. Justice Roberts put it in his dissent in *James* v. *Dravo*, *supra*, a tax is valid if it bears upon an independent contractor, does not discriminate, and is

[12] *Panhandle Oil Company* v. *Miss. ex rel. Knox*, 277 U. S. 218, 223.

[13] In his concurring opinion in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, Mr. Justice Frankfurter characterized the dictum as a "seductive cliché."

[14] 306 U. S. 466.

[15] — U. S. —, 62 S. Ct. 43. In this case a contractor erected an army camp under a cost-plus contract and the court upheld a tax on the sale of materials which was, therefore, ultimately paid by the United States. In a companion case, a "use" tax was also upheld. *Curry* v. *United States*, — U. S. —, 62 S. Ct. 48.

[16] Mr. Justice Frankfurter in *Graves* v. *New York ex rel. O'Keefe*, supra, at page 488.

not so burdensome as seriously to *interfere* with governmental functions."

The Milk Control Law is not directed against the Indiantown Gap Reservation. If the objects of the law are realized, the Reservation will benefit in common with the community in general. Conversely, as already pointed out, if dealers are to be free to ignore the law in dealing with the Reservation, the whole plan will suffer proportionately. The Reservation can buy milk as others buy milk and at any price which competition may fix, not lower than the established minimum. There is no burden upon it which does not likewise fall upon all users of milk, including institutions of this Commonwealth. See *Zeiger Milk Co.* v. *Pittsburgh School District, supra.* No attempt is made in the law or in the Order of the Board to give any order or direction to the Reservation or its Officers. The incidence of the law is upon dealers of milk. Although enforcement of the law against such dealers affects the price of milk to the Reservation as to others, yet that result is in its nature incidental. See *Milk Control Board* v. *Gosselin's Dairy Co.*, 301 Mass. 174, 16 N. E. (2d) 641, 643. Other statutes regulating the quality and providing for the inspection of milk are of similar effect.

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[17] He also points out (p. 172) in this dissenting opinion that the Solicitor General (now Mr. Justice Reed) filed a Brief advocating that "A non-discriminating state tax is to be judged not by the 'burden' it imposes, but by the extent of its 'interference' with the functioning of government."

All safety and health laws, of which the Wage Law [18] is an example, increase prices. And since the *King & Boozer Case, supra,* such laws are not deemed invalid, even though the increased cost is directly passed on to the government.

That the test of constitutionality in cases involving police regulations is the same as in tax cases seems clear and is apparently conceded on all sides. *Baltimore & Annapolis R. R.* v. *Lichtenberg,* 176 Md. 383, 4 A. (2d) 734, *appeal dismissed,* 308 U. S. 525, 60 S. Ct. 297; also *Stewart & Co.* v. *Sadrakula,* 309 U. S. 94. A tax on materials, to be added to cost and passed on to the government, imposes a burden no less direct than that imposed by a statute which fixes the minimum price to be charged by an independent contractor selling milk to the government. The government is, by the law, compelled to pay a demonstrably higher price in both instances. And we hold that, since the prices fixed are in no way discriminatory and are not such a burden as to interfere with the functioning of the federal government, they are valid. As Mr. Justice Holmes said, ". . . when the government comes into a state to purchase, I do not perceive why it should be entitled to stand

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Although Mr. Justice Roberts did not subscribe to the new test, it is interesting to note that he did not dissent in either *Graves* v. *New York ex rel. O'Keefe,* nor in the *King & Boozer* case.

[18] Act of 1937, May 27, P. L. 917, 43 PS 331.

differently from any other purchaser."[19] In the absence of prohibitive federal legislation, we are unwilling to disturb an enactment so well designed to provide for a local need.

Nor do we think the law interferes with the government's policy of competitive bidding. *Spahn v. Stewart*, 268 Ky. 97, 103 S. W. (2d) 651. The applicable statutes (U. S. Revised Statutes, Sec. 3709, 41 U. S. C. A. Sec. 5; 10 U. S. C. A. Secs. 1200 and 1201) provide merely that contracts for the purchase of supplies for the government shall be made after public notice and shall be awarded to the "lowest responsible bidder for the best and most suitable article." As pointed out in *United States v. Brookridge Farm, Inc.*, 111 F. (2d) 461, 463 (C. C. A. 10th), "The purpose of these statutes and regulations is to give all persons equal right to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition." The Milk Control Law contravenes neither the language of the statutes nor any of the above stated purposes. It does no more than put all bidders on an equal footing with regard to the minimum price and as we have already pointed out, its primary purpose is to assure *responsibility* with all that the word implies.

[19] *Panhandle Oil Case*, at p. 224.

In No. 311 October Term, 1941, the order of the court below affirming the order of the Milk Control Commission is affirmed, the costs to be paid by appellant. In No. 3 October Term, 1942, the appeal of the United States, which intervened in the court below in the case represented by the appeal to No. 311 October Term, 1941, is dismissed.

Rhodes, J., dissents.

DISSENTING OPINION

(Filed March 3, 1942)

Rhodes, J.:

I would reverse the order of the court below. Penn Dairies, Inc., the appellant, at the invitation of the Quartermaster of the United States Army, submitted a bid for furnishing bottled milk to the army at Indiantown Gap, Pa., for the months of March, April, and May, 1941. As low bidder appellant was awarded the contract to supply by daily deliveries, during such period, 540,000 half-pint bottles, and 135,000 quart bottles of milk. The only ground for this action was the alleged violation of the commission's minimum price schedules in its general order No. A–14. There is a stipulation as to facts and evidence. Paragraphs 1, 2, and 3 of the stipulation relate to admitted facts, and paragraphs 4, 5, 6, 7, 8, and 9, state what shall be considered as evidence of respondent (appellant here). In my opinion, this distinction is not especially material in this proceeding. There was no contradictory evidence. It seems too manifest to admit of any argument that if the commission's minimum price order applies in this case there could have been, as a matter of fact, no real competitive bidding. That was re-

quired in this case by acts of Congress. 41 U. S. C. A. § 5; 10 U. S. C. A. §§ 1191–1225. It does not appear to have been within any exception to the requirement. Paragraphs 8 and 9 of the stipulation read:

> "8. The profit which respondent [appellant here] would realize from the sale of the quantities covered by said contract, if sold at prices fixed by said order, would be a profit materially in excess of any margin of profit necessary to maintain stability in the milk industry.
>
> "9. The margin of profit which the respondent [appellant here] will realize under the said contract is adequate for respondent's purposes and to maintain stability in the industry."

A minimum price materially in excess of that necessary to afford stability to the milk industry and to give a reasonable margin of profit to the dealer would certainly eliminate competitive bidding. No one will believe that any responsible dealer who was capable of complying with the contract would bid, as a practical matter, above the fixed minimum. All responsible bids would be at the fixed minimum, and consequently the effect of the commission's minimum price order would be to prevent the free competition which the market would warrant for such a quantity of milk.

For the disposition of this appeal, I do not consider it necessary to decide the constitutional questions which have been raised, or determine the power of the commission as applied to the facts in this case. It is sufficient to refer to the conclusion, which I think is erroneous, in the majority opinion that the commission, on February 15, 1941, had issued an order which applied to this sale to the United States Government. I agree with appellant's argument that the commission's general order contains no schedule which can properly be applied to this contract; that such a contract was not contemplated when the general order was formulated; and that the effort of the commission to apply schedules intended for widely different situations is arbitrary, unreasonable, and unjustified. The stipulation entered into between the parties recited in considerable detail the saving to appellant in performing its contract with the United States Government made possible by the quantity of milk to be delivered.[1] The majority opinion attacks this stipulation on the ground that it is indefinite, and finds difficulty in interpreting the terms, "ordinary circumstances", and "ordinary conditions". I think the meaning is clear for the purposes of this controversy; and what was meant does not appear to be disputed by the commission. The terms were intended to designate the usual course of appel-

[1] See stipulated and admitted facts (28a, 29a).

lant's business with reference to all its other sales of milk. It was agreed in the stipulation that this was "the largest quantity of milk to be delivered by a single seller to a single purchaser, or for delivery in quantity lots, known to the respondent or to the commission." The suggestion in the majority opinion that under the circumstances a more useful comparison could have been made with "the cost of servicing other *large* consumers, such as hotels, restaurants, hospitals and other large institutions" is not convincing, and I think it is inapplicable. No milk contract of this magnitude has been known in Pennsylvania before. Appellant therefore drew a comparison with all of the remainder of its business, the subject matter of the commission's ordinary exercise of its authority, to demonstrate the conclusion which the commission in the stipulation conceded thus: "The profit which respondent would realize from the sale of the quantities covered by said contract, if sold at prices fixed by said order, would be a profit materially in excess of any margin of profit necessary to maintain stability in the milk industry." No producer would benefit from such excessive profits to the dealer. In my opinion, the commission's general order No. A–14 does not cover this contract,[2] and was not intended to

[2] This sale and purchase of milk by the Government of the United States for consumption by the army is not within the commission's order No. A–14 establishing minimum wholesale prices "to bakeries, hotels, restaurants, hospitals, and institutions for consumption on the premises," and to schools.

apply to the situation involved in this case, and the proper construction of that order makes it inapplicable to the facts which have been stipulated.

The Commission's argument that if its order did not apply to the present transaction because the transaction was not described in the order, then appellant should have applied to the commission as to applicable prices raises a matter which is not here involved. If there was no applicable schedule, there was no violation by appellant of the order as charged.

I would therefore reverse the order of the court below in sustaining the commission's refusal of the application for renewal of appellant's license.

OPINION OF THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA

Schaeffer, P. J.

The question for decision by the court is whether a milk dealer of Pennsylvania selling milk to the United States Government for use at a Military Reservation, located at Indiantown Gap, Pennsylvania, is subject to the minimum price orders of the Milk Control Commission of Pennsylvania in respect to such sales.

On March 5, 1941 the Milk Control Commission of Pennsylvania issued a citation to Penn Dairies, Inc., of Lancaster, Pennsylvania, to show cause why its application for a license to do business as a milk dealer for the year beginning May 1, 1941 and ending April 30, 1942, should not be refused, because it offered to sell and sold milk at less than the minimum prices as fixed by the Milk Control Commission of Pennsylvania. At a hearing held on March 18, 1941, Penn Dairies, Inc., admitted selling milk to the United States Government at less than the minimum prices, being at the rate of $0.079 instead of $0.095 for fresh pasteurized milk in quart bottles, and at $0.0215 instead of $0.025 for half pints, contrary to subdivision B of Section 4 of Official General Order A–6, as amended by Official General Order A–14 of the Commission. On March

25, 1941 the Milk Control Commission of Pennsylvania entered an order refusing the application of the Penn Dairies, Inc., for a milk dealer's license. An appeal was taken to this court and a supersedeas was granted, thereby permitting the appellant to furnish milk to the Indiantown Gap Military Reservation under the contract until final disposition of this appeal. On June 9, 1941 the United States, upon petition and a suggestion of interest in the pending litigation, was allowed to intervene.

It is conceded as a general legal proposition that a State cannot regulate an instrumentality of the United States Government if it constitutes a direct burden upon the Government and interferes with the performance of its functions. Should it be invoked and applied in all cases, especially where public policy justifies its waiver? In *Buckstaff Bath House Co.* v. *McKinley*, 308 U. S. 358, 60 S. Ct. 279, it is said "That petitioner is subject to the Social Security Act [of Arkansas] is extremely relevant to the solution of the problem at hand. For that Act laid the foundation for a cooperative endeavor between the states and the nation to meet a grave emergency problem. As pointed out by this Court in *Steward Machine Co.* v. *Davis*, *supra*, 301 U. S. page 588, 57 S. Ct. page 891; 81 L. Ed. 1279, 109 A. L. R. 1293, that Act was an attempt to find a method by which the states and the federal government could 'work together to a

common end'." In the Pennsylvania Milk Control Act of April 28, 1937, P. L. 417, the Legislature provided in Section 311: "The commission is hereby vested with authority to confer with legally constituted authorities of other states and of the United States with respect to uniform milk control within the states and as between states, to conduct joint investigations, to exchange information, hold joint hearings and issue joint, complementary or concurrent orders, and to enter into a compact or compacts for such uniform milk control, subject to such Federal approval as may be authorized or required by law." Subdivision (i) of Section 10 of the Act of Congress of May 12, 1933, c. 25, Title I, 48 Stat. 37, as amended and reenacted by the Act of June 3, 1937, c. 296, Section 1, 7 U. S. C. A. Section 610 (i), shows that the state and federal price control laws relating to milk and other agricultural commodities are intended to be as uniform and all-inclusive as possible. This subdivision provides: "The Secretary of Agriculture upon request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this chapter and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is

authorized to cooperate with such authorities." "Agricultural commodities" as used in these Acts mean, inter alia, "milk and its products." 7 U. S. C. A. Section 611.

The Commission contends that "one who contracts with the United States for the performance of services or the supply of materials does not thereby obtain immunity from state regulations." It is admitted that employees or officers of the United States are free from state regulations that interfere with the functions of government. *Ohio* v. *Thomas,* 173 U. S. 276, 19 S. Ct. 453. However, this immunity generally is not applicable to private persons or corporations who enter into contracts with the United States Government to furnish materials or to render services in an independent capacity. In *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 46 S. Ct. 172 (1926), Mr. Justice Stone referred to a party claiming immunity, "who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself cannot be deemed to be an interference with government or an impairment of the efficiency of its agencies in any substantial way." In *James Stewart & Co.* v. *Sadrakula,* 309 U. S. 94, 60 S. Ct. 431 (1940), the

Supreme Court said: "While, of course, in a sense the contract is the means by which the United States secures the construction of its post office, certainly the contractor in this independent operation does not share any governmental immunity." In *Buckstaff Bath House Co.* v. *McKinley,* 308 U. S. 358, 60 S. Ct. 279 (1939) supra, it is stated: "The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter. *Fidelity & Deposit Co.* v. *Pennsylvania,* 240 U. S. 319." In *Baltimore and Annapolis Railroad Co.* v. *Lichtenberg, United States, Intervener,* 176 Md. 383, 4 Atl. (2d) 734 (1939), it was decided that the Public Service Commission of Maryland had power to require a certificate from a contractor engaged solely in the carrying of passengers for the Federal Government on a public project. It is said: "The court is of opinion that there is no such interference as is prohibited to the State by the United States Constitution. Only the use of the roads of the State by an independent contractor is dealt with. There is no interference with any governmental instrumentality. A private instrumentality is availed of by contract, its use of the roads for gain to be turned to the service of the Government. And, as already stated, the court sees no foundation for holding that the Government may, for its greater convenience or for the sake of economy, relieve the contractor of the obligation to conform to the law.

Such an independent agency, engaged in its independent trade, must, in our opinion, be considered unchangeably subject to the law in its operation whether it contracts for its services with the Government or with promoters of private enterprises. See *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 58 S. Ct. 208." The Supreme Court said: "The appeal is dismissed for want of a substantial Federal question."

The United States Government contends that the Commission seeks "to regulate or control the activities of the Federal Government," and that "the individual States are without constitutional authority to apply their several police power laws to the United States." The United States relies upon the immunity as defined by Mr. Chief Justice Marshall in 1819 in *McCulloch* v. *Maryland*, 4 Wheat. 316, 436, involving the right of the State to tax a bank of the United States. He said: "The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." In *Johnson* v. *State of Maryland*, 254 U. S. 51 (1920), Mr. Justice Holmes delivered the opinion of the court. There the question related to the necessity of a state license to operate a government motor truck on the highways by an employe of the United States Post Office Department. He quoted from *Osborn* v. *Bank of the United States*, 9 Wheat.

738, as follows: "'Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.' In more recent days the principle was applied when the governor of a soldiers' home was convicted for disregard of a state law concerning the use of oleomargarine, while furnishing it to the inmates of the home as part of their rations. It was said that the federal officer was not 'subject to the jurisdiction of the State in regard to those very matters of administration which are thus approved by Federal authority'." Later in 1928 in a dissenting opinion by Mr. Justice Holmes, *Panhandle Oil Co.* v. *State of Mississippi*, 277 U. S. 218, 48 S. Ct. 451, joined in by Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice McReynolds, he said: "To come down more closely to the question before us, when the Government comes into a State to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the State and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the State that makes the business possible is just as necessary an element in

the cost of production as labor or coal. . . . . It does not appear that the Government would have refused to pay a price that included the tax, if demanded, but if the Government has refused it would not have exonerated the seller. *Pierce Oil Corporation* v. *Hopkins*, 264 U. S. 137, 139, 44 S. Ct. 251." He referred to the Coast Guard or the officials of the Veterans' Hospital as instrumentalities of government, but said: "The question of interference with Government, I repeat, is one of reasonableness and degree and it seems to me that the interference in this case is too remote." *Metcalf* v. *Mitchell*, 269 U. S. 514, 46 S. Ct. 172. Mr. Justice McReynolds in his dissenting opinion said: "The doctrine of immunity is well established, but it ought not to be extended beyond the reasons which underlie it. . . . . The federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise."

The attitude of Mr. Chief Justice Hughes on the question at issue in this case is set forth aptly in an article by Robert H. Jackson, as Attorney General of the United States, in the American Bar Association Journal of July, 1941, Volume 27, page 410, as follows: "Apart from the field of taxation, however, the Chief Justice has gone very far in sustaining state regulatory statutes, particularly those which have been assailed as being in conflict with

federal power. He has always appeared careful to concede the broad sweep of federal authority which could supersede the state statute if Congress should so desire; but even where Congress has legislated in the field, he has generally upheld the state statute if it was not in conflict with the federal legislation. State regulatory statutes generally have received hospitable consideration at his hands. His opinion in the historic Minnesota Mortgage Moratorium case is illustrative of his willingness to respect the action of the legislature except where there is a clear constitutional prohibition." In *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 58 S. Ct. 208, supra, Mr. Chief Justice Hughes delivered the majority opinion of the court. He said referring to taxation by either the State or Federal Government: "As 'neither government may destroy the other or curtail in any substantial manner the exercise of its powers,' we said that the limitation upon the taxing power of each, so far as it affects the other, 'must receive a practical construction which permits both to function with the minimum of interference each with the other. . . .'" He also said: "The contention ultimately rests upon the point that the tax increases the cost to the government of the service rendered by the taxpayer. But this is not necessarily so. . . . If the payment of the state taxes imposed on the property and operations of the taxpayer 'affects the federal government at all, it at most gives rise to a burden

which is consequential and remote and not to one that is necessary, immediate or direct'." Mr. Justice Roberts in his dissenting and minority opinion held that a sales tax on commodities sold to the Government, though laid upon the seller, is invalid as directly burdening the Government's transaction. In referring to the principle of Federal immunity he said: "The question is not one of quantum, not one of the weight of the burden, but one of power. . . . Where the principle *applies* it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute." (Italics supplied.)

It seems that such difference of opinion arises not as to the fundamental law but rather as to its application to the facts and circumstances of each case. In the construction of the Milk Control Act of Pennsylvania by Mr. Justice Roberts in *Milk Control Board of Pennsylvania* v. *Eisenberg Farm Products*, 306 U. S. 346, 59 S. Ct. 528 (1939), he said: "But in matters requiring diversity of treatment according to the special requirements of local conditions the states remain free to act within their respective jurisdictions until Congress sees fit to act in the exercise of its overriding authority. One of the commonest forms of state action is the exercise of the police power directed to the control of local conditions and exerted in the interest of the welfare of the state's citizens. Every state police statute necessarily will affect interstate commerce in some degree, but such a statute does not run

counter to the grant of Congressional power merely because it incidentally or indirectly involves or burdens interstate commerce. This is so even though, should Congress determine to exercise its paramount power, the state law might thereby be restricted in operation or rendered unenforceable. These principles have guided judicial decisions for more than a century. Clearly they not only are inevitable corollaries of the constitutional provision, but their unimpaired enforcement is of the highest importance to the continued existence of our dual form of government. The difficulty arises not in their statement or in a ready assent to their propriety, but in their *application.*" [Italics supplied.]

In *Paterson Milk & Cream Co., Inc.*, v. *Milk Control Board et al.*, decided by the Supreme Court of New Jersey in 1937, 192 Atl. 838, it is said: "The second point made is that sales made to the United States government by the prosecutor, at prices below those fixed by the Milk Control Board, were not subject to the Milk Control Act of this state. . . . It was settled in *Trinity-farm Construction Company* v. *Grosjean*, 291 U. S. 466, . . . that where the United States deals with a corporation the corporation with which it deals is subject to state regulations. Hence, it would seem that the prosecutor was obliged to obey the reasonable regulations of the Milk Control Board of this state, and the fact that he dealt with the United States government is no justifica-

tion for his disregard of the reasonable regulations of this state." In *Milk Control Board* v. *Gosselin's Dairy, Inc.*, 16 N. E. 2d 641, the Supreme Judicial Court of Massachusetts in 1938 said: "It is conceded of course, fully and ungrudgingly, that a State cannot attempt to regulate an instrumentality of the United States or impose burdens upon it which interfere with its operation and efficiency. On the other hand we apprehend that an institution of the Federal government situated within a State cannot wholly escape every consequence arising from a fact so pervasive and insistent as is the fact of location in the midst of a civilized community whose orderly existence and continuance are derived from and supported by another sovereignty of general powers. . . . There is no discrimination against the hospital. It can buy milk as others buy milk and at any price which competition may fix not lower than the established minimum. No burden upon it can result, even indirectly, which does not likewise fall upon all users of milk, including institutions of this Commonwealth of comparable nature. No attempt is made in the law, or in the order of the board, or in this litigation to control or to give any order or direction to the veterans' hospital or to any of its officers. The incidence of the law is upon dealers in milk. Although enforcement of the law against such dealers may in fact affect the price of milk to the hospital as well as to others,

yet that result is in its nature incidental and collateral rather than immediate and direct. . . . . We incline to the view that a dealer furnishing milk in this Commonwealth to the veterans' hospital remains bound by the Massachusetts milk control law." This court in *Commonwealth* v. *Wayne L. Rohrer*, 45 Lanc. L. R. 553 (1937) reached a similar conclusion.

It is contended also that "the Milk Control Law does not purport and should not be construed to authorize the Commission to fix prices for sales of milk to the United States." Article VIII, Section 802 of the Milk Control Law of April 28, 1937, P. L. 417, authorizes the Commission to fix prices for milk sold, inter alia, by milk dealers to consumers. According to Article I, Section 103 of the Milk Control Law, " 'Consumers' means any person, other than a milk dealer, who purchases milk for consumption or use." It is then provided in the same section that " 'person' includes an individual, corporation, association, partnership, limited partnership, or other unincorporated enterprise owned by two or more individuals." In *Baker et al.* v. *Kirschnek et al.*, 317 Pa. 225 (1935), it was decided that the Commonwealth is not a person within the meaning of special Act incorporating the Borough of Media which provides that it shall not be lawful for any person or persons to sell intoxicating liquors within the limits of the borough. The court said: "In construing a statute, words are to be

taken in their ordinary sense, unless, from a consideration of the whole act, it appears that a different meaning was intended." In *Stanley* v. *Schwalby*, 147 U. S. 508, 517, 13 S. Ct. 418 (1893), it was held that the United States was a "person" and could set up the bar of the state statute of limitations that ran in favor of persons. Mr. Chief Justice Fuller said: "Of course, the United States were not bound by the laws of the State, yet the word 'person' in the statute would include them as a body politic and corporate." In a recent case decided in 1941, *United States* v. *Cooper Corporation et al.*, 61 S. Ct. 742, which is applicable to the case at bar in the interpretation of the statute in question, Mr. Justice Roberts in delivering the opinion of the court said: "Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law. . . . . Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense; and if doubts remain, resolve them in the

light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction."

Whether or not the United States is a person, or a consumer of milk, within the meaning and purpose of the Milk Control Act depends largely upon the purpose or public policy intended to be served by that Act. While it is not the province of the court to determine what constitutes such policy in the field of public health, nevertheless, its purpose, as set forth in the preamble of the Act is recognized in *Rieck-McJunkin Dairy Company* v. *Milk Control Commission of Pennsylvania,* 341 Pa. 153 (1941), by Mr. Justice Stern: "The main purpose of the Milk Control Law [is] to insure a sufficient supply of wholesome milk, which cannot be accomplished unless, as the preamble of the act recites, 'the high cost of maintaining sanitary conditions of production and standards of purity is returned to the producers of milk'." In *United States* v. *Rock Royal Co-op. Inc., et al.,* 307 U. S. 533, 59 S. Ct. 993, Mr. Justice Reed said: "The power of a state to fix the price of milk has been adjudicated by this Court. . . . . So essential is it for health that the consumer has been willing to forego unrestricted competition from low cost territory to be assured of the producer's compliance with sanitary requirements." With this purpose and policy in mind the State Legislature intended

that the word "consumer" as used in the Milk Control Act with respect to the sale of milk, be all-inclusive. The Act expressly and clearly excepts only a milk dealer. The Statutory Construction Act of Pennsylvania, May 28, 1937, P. L. 1019, Article IV, Section 54, provides: "Exceptions expressed in a law shall be construed to exclude all others." By excluding all others except a milk dealer both provisions of said Section 103, relating to consumer and person, are given effect in carrying out the paramount purpose of the Milk Control Act in accordance with Section 63 of the same Act. In *Keating* v. *White et al.*, 141 Pa. Superior Ct. 495, 504 (1940), quoting from *New York Life Insurance Co.* v. *Guaranty Corporation*, 321 Pa. 359, it is said: "To arrive at the real meaning, it is always necessary to take a broad general view of the act, so as to get an exact conception of its aim, scope and object. . . . . The true meaning is to be found, not merely from the words of the act, but from the cause and necessity of its being made, from a comparison of its several parts and from extraneous circumstances." Such construction of the statute is not analogous to the situation presented in the case of *Green et al.* v. *Milk Control Commission et al.*, 340 Pa. 1 (1940), where it was said: "The power and authority to be exercised by administrative commissions must be conferred by legislative language clear and unmistak-

able. . . . . With the principle stated before us, turning to the law embodying the powers of the Milk Control Commission, we find nothing said about milk shipped to dealers on consignment. . . . . We are asked by the Commonwealth to interpolate these words into the Act. This we cannot do without violating the important principle to which we have adverted." The case at bar involves the interpretation of words expressed in the statute rather than supplying words which are wanting in the statute.

It is argued that the Commission's price-fixing authority cannot be applied to government purchases constitutionally, because it would conflict with Federal statutes requiring competitive bidding and price competition. In Title 10 of the United States Code Annotated (July 5, 1884, c. 217, 23 Stat. 109; Aug. 24, 1912, c. 391, Section 3, 37 Stat. 591), it is provided in Section 1200 that in the letting of contracts for quartermaster supplies for the Army, "the award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids". However, it is not absolutely required under all conditions and in all instances as shown by Section 1201, Title 10 of the United States Code Annotated (Mar. 2, 1901, c. 803, 31 Stat. 905), which provides as follows: "Except in cases of emergency or where it is impracticable to secure competition, or in cases

otherwise provided for, the purchase of all supplies for the use of the various departments, and posts of the Army and of the branches of the Army service shall only be made after advertisement; and said supplies shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered." In *Good Roads Machinery Co. of New England* v. *United States*, 19 Fed. Supp. 652 (1937), it was decided that purchases of material and equipment for a civil works project by an administrator or officer of the United States were made under "public exigency" requiring immediate delivery, and hence advertising for competitive bids was not essential under Section 3709 of the Revised Statutes of the United States (41 U. S. C. A., Section 5).

In a written notice by the Pennsylvania Milk Control Commission to all milk dealers interested in submitting bids to the United States Government at Indiantown Gap, Pennsylvania, the Commission fixed the minimum milk prices to be considered by the bidders in the preparation of their bids with respect to the grades of milk therein mentioned. This order and notice of the Commission did not prevent competitive bidding, after due advertisement, but fixed only the minimum prices to be submitted by the milk dealers of Pennsylvania. Furthermore, the Act of Congress

above cited expressly provides that advertising and competitive bidding are not required "where it is impracticable to secure competition, or in cases otherwise provided for." In *Lukens Steel Co. et al.* v. *Perkins et al.*, 107 Fed. Repr. (2d) 627, the United States Court of Appeals for the District of Columbia in 1939 decided that where a determination of the Secretary of Labor established minimum wages in a particular locality for purposes of public contracts and provided that such minimum wages should apply to all contracts awarded subject to the Act of Congress, it was binding on persons submitting bids for government contracts and on government agencies. This case was affirmed by the United States Supreme Court in 310 U. S. 113, 60 S. Ct. 869, but on other grounds.

The fact that the Commonwealth of Pennsylvania is the owner of the Military Reservation of 12,638¼ acres at Indiantown Gap, Pennsylvania, and permits the United States to use it for its troops, does not affect the fundamental legal question involved in this case, but it indicates a spirit of cooperation in our present national emergency.

Irrespective of the juridical phase of this case in relation to the United States Government and its increasing instrumentalities, it is evident that a general compliance with the Milk Control Act in question is in harmony with and promotes both the

Federal and State policy to provide pure and wholesome milk not only for our citizens but also for our soldiers.

The conclusion is reached that the appellant as a milk dealer of Pennsylvania is subject to the Milk Control Act of Pennsylvania, and, accordingly, must submit its bids for the sale of milk to the United States Government at the Indiantown Gap Reservation on the basis of minimum prices as promulgated by order of the Commission. Such conclusion is in accord with the decisions of the Supreme Courts of New Jersey and Massachusetts, supra.

XII FINAL ORDER

And now, July 25, 1941, the order entered by the Milk Control Commission of the Commonwealth of Pennsylvania on March 25, 1941, refusing a milk dealer's license for the year beginning May 1, 1941 and ending April 30, 1942, to the Penn Dairies, Inc., of Lancaster, Pennsylvania, the appellant, is sustained.

By the Court:

OLIVER S. SCHAEFFER,
P. J.

FINDINGS OF FACT AND ORDER OF THE MILK COMMISSION

On March 5, 1941, a citation was directed against the respondent, Penn Dairies, Inc., requiring it to show cause why its application for a milk dealer's license for the year May 1, 1941 to April 30, 1942, inclusive, should not be refused for offering to sell and selling milk at less than minimum prices fixed by the Milk Control Commission. The alleged offer and sale were to the purchasing and contracting officer at Indiantown Gap, Pennsylvania, a United States Military Reservation. The respondent filed an answer to the citation, admitting the material allegations of the citation, but claiming that the offer and sale were not in violation of the Milk Control Law for two reasons: (1) that the offer and sale having been made to the United States, the respondent did not have to observe the orders of the Pennsylvania Milk Control Commission, and (2) that the order was not applicable to this transaction because the minimum price was too high. A hearing was held before the Milk Control Commission on March 18, 1941, at which time certain testimony was received.

From the pleadings and testimony before it, the Milk Control Commission makes the following findings of fact:

1. The defendant, Penn Dairies, Inc., is a corporation organized under the laws of the Common-

wealth of Pennsylvania, doing business as a milk dealer in several parts of the Commonwealth of Pennsylvania and having its principal place of business in Lancaster, Pennsylvania, at 572 North Queen Street, and at 623 Second Street.

2. The defendant, Penn Dairies, Inc., has applied to the Milk Control Commission of Pennsylvania for a milk dealer's license for the year May 1, 1941, to April 30, 1942, inclusive.

3. On or about February 1, 1941, the purchasing and contracting officer of the Quartermaster at Indiantown Gap, Pennsylvania, sent to the defendant Penn Dairies, Inc., at Lancaster, Pennsylvania, a standard government form of invitation for bids, Form No. 30, Invitation No. QM 517–41–14, accompanied by standard government form of bid No. 31, and standard government form of continuance, Schedule No. 36.

4. Said standard form No. 30 as issued by the purchasing and contracting officer read as follows:

"STANDARD GOVERNMENT FORM OF INVITATION FOR BIDS

(Supply Contract)
Invitation No. QM. 517–41–14
February 1, 1941

"Sealed bids, in triplicate will be received in this office until the date and hour named in the accompanying schedules and then publicly opened, for furnishing the materials and supplies called for therein.

"Bids must be submitted upon the Standard Government Form of Bid, (Standard Form No. 31) and in accordance with the Standard Government Instructions to Bidders (Standard Form No. 22) and any special instructions supplementary thereto.

"Envelopes containing bids must be sealed and marked on the upper left-hand corner with the name and address of the bidder and the date and hour of opening and addressed to the purchasing agency named below:

"Purchasing and Contracting Officer,
Office of the Quartermaster,
Indiantown Gap, Pennsylvania.

"Marked: Bid for Milk, Buttermilk and Ice Cream. March 1 to June 30, 1941, requirements.

"To be opened: 10:00 a. m. Eastern Standard Time, February 15, 1941.

"Special purchase conditions, attached to said invitation for bids, provided, in part, as follows:

1. General: Bids are invited for supplies as specified in this invitation, all or any part thereof, to be delivered as specified, all transportations, switching or drayage charges to be prepaid by the contractor and supplies to be subject to final inspection and acceptance at destination.

"23. * * *

"Milk, Bread & Ice Cream: Deliveries of Milk, Bread and Ice Cream will be made daily to Military Organization Barracks,

Indiantown Gap, Pa., on days called for by the Quartermaster, or his authorized representative, and at such time as directed. It is understood and agreed that the milk bottles and all containers shall remain the property of the contractors and every possible precaution will be maintained to preserve same in the original state, but in the event of damage to these articles while in the possession of the Government, the Government will not be held responsible for such damages, as the purchase in question is a purchase of contents only."

5. Thereafter and prior to 10:00 a. m., Eastern Standard Time, February 15, 1941, Penn Dairies, Inc., in accordance with said invitation for bids, offered by writing delivered to said purchasing and contracting officer, to sell to the purchasing and contracting officer in the office of the Quartermaster, Indiantown Gap, Pennsylvania, 135,000 one quart bottles of fresh pasteurized milk at $0.079 per bottle, and 540,000 half pint bottles of fresh pasteurized milk at $0.0215 per bottle. The schedule for bid and the defendant's bid described 135,000 quarts of fresh milk and the 540,000 half pints of fresh milk as items Nos. 1 and 3 respectively, in said bid, the respective descriptions in said invitation and bid reading as follows:

"Item No. 1—Milk, Fresh, Grade A Pasteurized, 1 Qt. Bottles, W/Sanitary Protective Type Caps. Type 11 C–M–381B 135,000 Btl.

"Item No. 3—Milk, Fresh, Grade A. Pasteurized, ½ Pt. Bottles, W/Sanitary Protective Type Caps. Type 11 C–M–381 B 540,000 Btl."

6. Indiantown Gap, a United States Military Reservation, is an institution of the United States for military training, situate in the northwestern part of Lebanon County between state highway route No. 443 and state highway route No. 343, in the State of Pennsylvania, and is situate in Area No. 11 of Pennsylvania, as designated by the Milk Control Commission of Pennsylvania, being the State-Wide Milk Marketing Area.

7. Minimum wholesale prices to be charged by milk dealers for milk sold in bottles or other containers in Area No. 11, the State-Wide Milk Marketing Area, are established by Official General Order No. A–6 of the Milk Control Commission, as amended by Official General Order No. A–14, in Section 4, Subdivision (b).

8. Grade A pasteurized milk, as described in the aforesaid invitation to bid, is equivalent to Grade B milk as described in Official General Orders Nos. A–6 and A–14 of the Milk Control Commission and other price-fixing orders of the Commission. The part of Section 4 (b) of Official General Order No. A–14, amending and superseding that portion of Official General Order No. A–6 that applies to the present case reads as follows:

"(b) Minimum Wholesale Prices. Milk dealers to other milk dealers and to stores

for resale; and to bakeries, hotels, restaurants, hospitals and institutons for consumption on the premises:

Product	Unit Price		
	Quart	Pint	Half-Pint
Grade "A" Milk			
Grade "B" Milk			
	$0.115	$0.06	$0.035
Exceeding 4% B. F.	.105	.06	.035
Not exceeding 4% B. F.	.095	.05	.055
Grade "B" Milk to Schools			
Not exceeding 4% B. F.			.0275

* * * * *

The above price to schools include service charges for ice, straws, or special boxes. If these services are not rendered, the above prices may be reduced by $0.0025 per half-pint."

9. The Milk Control Commission has treated Indiantown Gap Military Reservation as an educational institution or school thereby allowing the benefit of an interpretation of such official general orders Nos. A-6 and A-14 favorable to the application of the lowest minimum prices possible for milk sold to Indiantown Gap Military Reservation, and announced to all known interested parties, including the defendant, Penn Dairies, Inc., that the minimum prices to be charged by milk dealers for fresh pasteurized milk in half pints sold to the purchasing and contracting officer at Indiantown Gap shall be $0.025 per half pint of milk where Grade B milk as described in said official general orders is fur-

nished and there are no special services of ice, straws or special boxes.

10. On February 15, 1941, at 10:00 o'clock a. m., Eastern Standard Time, the aforesaid bid of the defendant Penn Dairies, Inc., as well as other bids submitted, were opened by the purchasing and contracting officer in the office of the Quartermaster, Indiantown Gap, Pennsylvania, and thereafter the offer of the defendant, Penn Dairies, Inc., to sell 135,000 quarts of fresh pasteurized milk and 540,-half pints of fresh pasteurized milk, as hereinbefore stated, was accepted and a contract thus entered into.

11. The defendant, Penn Dairies, Inc., in accordance with the said offer to sell and contract for, has delivered milk to several mess halls and other places at said Indiantown Gap Military Reservation.

12. The milk so delivered was received from milk producers in and near Lancaster County, Pennsylvania, by defendant, Penn Dairies, Inc., at its place of business at 623 Second Street, Lancaster, Pennsylvania, where it was weighed, tested, processed, bottled, capped, crated and loaded on trucks of the defendant for delivery by employees of the defendant to said Indiantown Gap Military Reservation.

13. The prices at which the defendant, Penn Dairies, Inc., offered to sell and did sell milk to the purchasing and contracting officer at the office of the Quartermaster, Indiantown Gap, Pennsyl-

vania, were $0.079 instead of $0.095 for quarts of fresh pasteurized milk in quart bottles, and $0.0215 instead of $0.025 for half pints, as respectively provided in subdivision B of Section 4 of Official General Order A–6, as amended by Official General Order A–14, and therefore said offer to sell and the sales thereof are in violation of Section 807 of the Milk Control Law of April 28, 1937, P. L. 417, 31 PS Section 700j, and the application for Penn Dairies, Inc., for a milk dealer's license for the year May 1, 1941, to and including April 30, 1942, should be refused under Section 404 (10) of the Milk Control Law.

14. The Milk Control Commission finds that the testimony on behalf of the respondent does not show that Official General Order No. A–6, as amended by Official General Order No. A–14, is inapplicable to the facts of this case or invalid.

15. The respondent, Penn Dairies, Inc., did not prior to the issuance of this citation and has not since then filed with the Milk Control Commission any request for any amendment or revision to Official General Order No. A–6, as amended by Official General Order No. A–14. The Milk Control Commission has not received any such request from any other milk dealer affected by said orders.

Discussion

The first legal proposition submitted to the Commission by the respondent is that because it sells milk under the contract in question to an

instrumentality of the United States, the orders of the Milk Control Commission are not applicable. This contention cannot be sustained.

In the case of *Commonwealth* v. *Rohrer*, 37 D. & C. 410, 421, in an opinion by Judge Schaeffer, the Court of Quarter Sessions of Lancaster County held that a milk dealer who sells milk to a United States Veterans Hospital must do so at the minimum prices prescribed by the Commission. The facts in that case were almost identical in the present case before the Commission. There appear to be only two other cases directly in point. These are *Paterson Milk and Cream Company, Inc.*, v. *Milk Control Board*, 118 N. J. L. 383, 192 Atl. 838, and *Milk Control Board* v. *Gosselin's Dairy, Inc.*, 16 N. E. (2d) 641, 644 (Mass. 1938). The law is so well discussed in the opinion by Judge Schaeffer that no further discussion will be made here. It is sufficient to say that the regulations of the Milk Control Commission are an exercise of the police power to which the respondent milk dealer is subject. There is no attempt by the Commission to regulate the actions of United States officers upon United States territory.

The second legal defense that the respondent interposes is that the order of the Milk Control Commission in this particular case is not reasonable.

The respondent milk dealer has not requested a hearing pursuant to Article VIII of the Milk

Control Law for the purpose of revising Official General Order No. A-6, as amended by Official General Order No. A-14. The present hearing is one concerning only the Milk Control Commission and the respondent dealer. A hearing to revise or amend a price order is one in which all interested parties are entitled to due notice. It would be manifestly unfair for the Milk Control Commission to say without allowing other interested parties to be heard, that this particular order is unreasonably high. The respondent cannot disregard an order of the Milk Control Commission and attempt to bring out facts that show unreasonableness of the order in a proceeding of this kind. This can only be done by an appeal from the price order itself or by petition to have a price order amended or revised.

Those milk dealers who rely upon the validity of a price order and govern their bids and sales accordingly would be the victims of uncertainty if the respondent were able to disregard the orders of the Commission and acquire a contract at other than lawful prices by reason of alleged unreasonableness of the orders.

The Superior Court of Pennsylvania so held in the case of *Commonwealth* v. *Ziegler-Dairy Company*, 139 Pa. Superior Ct. 224, 11 Atl. (2d) 669, in which President Judge Keller discussed this matter fully.

ORDER OF THE MILK CONTROL COMMISSION

And now, this 25th day of March, A. D. 1941, the application of Penn Dairies, Inc., Lancaster, Pennsylvania, the respondent herein, for a milk dealer's license for the year May 1, 1941, to April 30, 1942, inclusive, is refused for the reasons above stated.

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

JOHN M. MCKEE,
Chairman,

JOHN J. SNYDER,
Member.

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No. 399

In the Supreme Court of the United States

OCTOBER TERM, 1942

PENN DAIRIES, INC., AND THE UNITED STATES OF AMERICA, APPELLANTS

v.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR THE APPELLANTS

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BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The findings and order of the Milk Control Commission of Pennsylvania (R. 34–39) and the opinion and judgment of the Court of Common Pleas of Lancaster County, Pennsylvania (R. 56–66) are not reported. The opinion of the Superior Court of Pennsylvania (R. 79–85) and the dissenting opinion (R. 85–87) are reported in 148 Pa. Super. 261. The opinion of the Supreme Court of Pennsylvania (R. 94) is reported in 344 Pa. 635.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered May 25, 1942 (R. 94). The joint appeal was taken on July 27, 1942, and allowed on August 8, 1942 (R. 94–95). This Court noted probable jurisdiction on October 26, 1942 (R. 98). The jurisdiction of this Court rests on Section 237 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the minimum prices for purchases or sales of milk, established under the Pennsylvania Milk Control Law, may be applied to sales of milk by a distributor to the United States.[1]

STATUTES INVOLVED

The applicable portions of the constitutional provisions and statutes involved are set forth in the Appendix.

STATEMENT

The Pennsylvania Milk Control Law of April 28, 1937,[2] establishes a Milk Control Commission

[1] No question is raised as to the right of Pennsylvania to fix prices at the producer-distributor level for milk which ultimately is sold to the United States.

[2] Act No. 105, P. L. 417, §§ 101 *et seq.*; Penn. Stat. Ann. (Purdon 1930, supp.), Tit. 31, §§ 700j–101 *et seq.* This statute was amended on July 24, 1941 (Act No. 177, P. L. 443), more than four months after this proceeding was instituted before the Milk Control Commission, but the basic structure and purpose of the statute were left untouched. Reference will hereafter be made to the only amendment relevant to this case.

(§ 201) with authority to fix prices for milk (§§ 801–803), including minimum wholesale and retail prices for milk sold by milk dealers to consumers (§ 802), and to issue rules, regulations, and orders to effectuate this authority (§ 307). In the fall of 1940 the United States established under a permit from the Commonwealth of Pennsylvania (R. 32–33) a large military encampment on lands belonging to the Commonwealth at Indiantown Gap, Dauphin County, Pennsylvania. On or about February 1, 1941, the purchasing and contracting officer of the Quartermaster of the United States Army at Indiantown Gap Reservation invited bids for the supply of milk for the period from March 1 to June 30, 1941, for consumption by the troops maintained at the camp. (R. 34–36, 51.) On February 4, 1941, the Milk Control Commission sent a notice to all known interested parties, including appellant Penn Dairies, Inc., addressed "To All Milk Dealers Interested In Submitting Bids to Furnish Milk to the United States Government at Indiantown Gap, Penna. During the Period from March 1 to June 30, 1941 inclusive" (R. 10, 11). The notice was accompanied, for the dealer's "information and guidance," with a copy of the Commission's Official General Order No. A–14. Section 4 (b) of that order prescribed "the minimum wholesale prices to be charged by or paid to milk dealers." The notice announced that the unit prices specified in Section 4 (b) of the

price order should be considered in the preparation of bids, and—

> Any purchases or sales of milk made or offers to buy or sell milk at prices below the prescribed minimum prices of effective Official General Orders of this Commission are construed as violations of the Milk Control Law.
>
> The Milk Control Commission expects compliance with its orders, rules, and regulations, and will appreciate your cooperation in this matter. (R. 11–13.)

Appellant Penn Dairies, Inc., a Pennsylvania corporation doing business as a milk dealer and having its principal office in Pennsylvania, submitted a bid offering to sell to the United States 135,000 one-quart bottles of milk at $.079 per bottle, and 540,000 half-pint bottles of milk at $.0215 per bottle (R. 14, 36). These prices were below those designated by the Milk Control Commission, $0.095 and $0.025, respectively (R. 23–31, 38). By War Department Purchase Order dated March 1, 1941, the contract was awarded to Penn Dairies as the lowest of several bidders, and milk deliveries were made thereunder (R. 10, 14, 38, 54–55).

On March 5, 1941, the Milk Control Commission pursuant to Section 404 of the Milk Control Law issued a citation to Penn Dairies to show cause why its application for a milk dealer's license for the year commencing May 1, 1941, should not be refused on account of such sale and delivery below

the minimum prices fixed by General Order A–14 (R. 7–14). The answer of Penn Dairies denied the jurisdiction of the Commission to regulate prices charged to the United States, and attacked the price order on other grounds not here involved (R. 13–16). After a hearing (R. 19–33), the Commission denied Penn Dairies' license application on account of its offer to sell and its sale of milk to the United States at prices below those fixed by the Commission. The Commission held that the price order as applied to this transaction was valid. (R. 34–39.)

Penn Dairies appealed the Commission's order to the Court of Common Pleas of Lancaster County, raising the federal constitutional question, among others (R. 40–42).[2] Thereafter, with leave of the President Judge, the United States filed a suggestion of interest and intervened, asserting that the Commission was without lawful authority or power to fix or regulate the minimum prices

[2] With that appeal and each subsequent appeal there has been granted a *supersedeas* staying all proceedings under the Commission's order until final disposition of the appeal (R. 43). Under Section 406 of the Pennsylvania Milk Control Law, the effect of an appeal and *supersedeas* is to prevent the Commission, pending the appeal, from refusing future licenses as a result of the violation involved in the appeal. By reason of the orders of *supersedeas* the Commission, acting under Section 406, has successively issued conditional licenses to Penn Dairies for the years beginning May 1, 1941, and May 1, 1942, which are by law automatically cancelled five days after the termination of the litigation favorably to the Commission.

to be charged by milk dealers in selling milk to the United States (R. 47–56). The Court of Common Pleas held that the Milk Control Law was intended to apply to sales of milk to the United States; that the defense of federal immunity from state regulation was not available to Penn Dairies; and that there is no conflict between the state price law as thus applied and the federal competitive bidding statutes (R. 56–66). The court's judgment, rendered on July 25, 1941, sustained the Commission's order refusing Penn Dairies a milk dealer's license (R. 66).

The judgment of the Court of Common Pleas was affirmed by the Superior Court (R. 79–85),* and later by the Supreme Court of Pennsylvania (R. 94). Before both courts, Penn Dairies and the United States (which has participated continuously in the litigation since intervening) urged that the State Milk Control Law and the Commission's price orders could not constitutionally be applied to sales of milk to the United States (R. 74–78, 87–94). Both courts held, however, the Supreme Court adopting the opinion of the Superior Court, that the Milk Control Law and the Commission's price-fixing order thereunder were applicable to sales to the United States; and that such application did not impose an unconstitu-

*One judge dissented on the ground that the Commission had issued no price order applicable to sales to the United States (R. 85–87).

tional burden on the United States because "the incidence of the law" was upon milk dealers and its effect upon the Government was only incidental. Both courts considered it immaterial, in view of this Court's decision in *Alabama* v. *King & Boozer*, 314 U. S. 1, that the increased cost, resulting from the minimum price, was passed on directly to the United States. The courts below also held that the order did not interfere with the federal competitive bidding statutes. (R. 79-85, 94.)

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Pennsylvania erred:

1. In holding that the incidence of the Milk Control Law was only upon milk dealers and not also upon purchasers of milk.

2. In holding that the application of the minimum price regulation to purchases by the United States constituted a constitutional exercise of state authority.

3. In holding that the application of the minimum price regulation to purchases by the United States did not conflict with federal competitive bidding statutes.

4. In holding that the State Milk Control Commission properly refused to issue a milk dealer's license to Penn Dairies on account of its sales of milk to the United States at prices below the minimum fixed by the Commission.

5. In affirming the judgment of the Superi Court.

SUMMARY OF ARGUMENT

I

As applied to purchases of milk by the United States, the Pennsylvania Milk Control Law is unconstitutional. A state may not regulate the United States in the performance of its governmental functions notwithstanding that the attempted regulation is by a nondiscriminatory statute of general application. A regulation of the price at which the seller may sell fixes a term of the contract of sale and purchase, and therefore is a direct regulation of the terms on which the buyer must buy, even though he is not named in the law. The legal incidence of the law is on the buyer as immediately and fully as if it were formally addressed to him. Consequently, where the United States is the buyer, application of the Milk Control Law to the sale is an attempt to regulate the governmental activities of the United States and is forbidden by the federal constitution.

This conclusion is confirmed by the cases dealing with intergovernmental immunity from taxation. The instant case is to be distinguished from a tax collected from a seller who deals with the United States but who, so far as the law is concerned, may absorb any part of the tax. The instant case is analogous to the situation which would be presented if a state levied a sales tax on sales to the United States and required the seller to pass the tax on to the buyer. And it has never been

doubted that, even in the absence of an express prohibition by Congress, such a tax would be invalid as applied to sales to the United States.

II

The Pennsylvania Milk Control Law conflicts with the procurement policy established by Congress in the competitive bidding statutes. The purpose of those statutes is to secure the lowest economically possible price, and to prevent favoritism in the award of contracts by requiring the award to be made to the lowest responsible bidder. Minimum price laws are intended to, and do, keep prices above competitive levels. Application of the Milk Control Law therefore would frustrate the purposes of the federal statutes, and since the two are inconsistent, the former must, under the Constitution, yield supremacy to the latter.

ARGUMENT

I

THE UNITED STATES IS IMMUNE FROM STATE REGULATION OF THE PRICE TERM OF ITS PURCHASE CONTRACTS

In upholding the validity of the order of the Milk Control Commission, the court below did not advert to the decisions of this Court dealing with state regulation as distinct from state taxation. Referring to the tax cases, it held that the incidence of the state price law was upon the milk

dealers only and cited *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, and *Alabama* v. *King & Boozer*, 314 U. S. 1, as supporting its conclusion. We submit, however, that the controlling principles are those developed in the decisions dealing with the immunity of the federal government from state *regulation* and that the application of such principles requires reversal of the decision below. Since, however, the decisions concerning federal immunity from state taxation may furnish appropriate analogies [5] we shall also show that the cases relied upon by the court below do not support its conclusion but in fact give additional strength to our position that the State Milk Control Law may not under the Constitution be applied to purchases by the United States.

A. THE STATES HAVE NO POWER TO REGULATE THE ACTIVITIES OF THE FEDERAL GOVERNMENT

The immunity of the national government from regulation by state law is beyond question. When the dual system of government results in conflict between state regulation and federal activities, the former must yield under the supremacy clause of Article VI, for, as stated by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 427:

> It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power

[5] See e. g., *Johnson* v. *Maryland*, 254 U. S. 51; *Ashton* v. *Cameron County District*, 298 U. S. 513.

> vested in subordinate governments, as to exempt its own operations from their own influence. * * *

The constitutional prohibition against state action regulating the activities of the federal government, frequently reiterated in the opinions of this Court,[6] is coextensive with the scope of federal functions, for every activity of the United States is an exercise of its governmental power (see *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95).

This is conceded here; likewise, there is, of course, no question but that the purchase of supplies for the Army is a legitimate federal activity. The inquiry, therefore, is whether the minimum price order applied to purchases of milk by the United States is an attempt by the state to regulate the federal government or its functions. The court below apparently concluded that only the milk dealer was regulated because "no attempt is made in the law or in the Order of the Board to give any order or direction to the [federal] Reservation or its officers" (R. 84). But this characterization of the state law, which we assume to be a conclusive interpretation of the law, cannot foreclose this Court from determining independently whether the

[6] See e. g., *Osborn* v. *United States Bank*, 9 Wheat. 738; *Weston* v. *City Council of Charleston*, 2 Pet. 449; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 590–591; *Ohio* v. *Thomas*, 173 U. S. 276, 283; *Matter of Heff*, 197 U. S. 488, 505; *Johnson* v. *Maryland*, 254 U. S. 51, 55–56.

incidence of the law as thus construed renders it unconstitutional. Cf. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443–444.

An examination of the Pennsylvania Milk Control Law and of the price order issued thereunder shows that they are in legal and practical effect regulations of the sale and purchase of milk, and therefore, as here applied, are attempts to regulate purchases by the United States. Section 802 directs the Milk Control Commission to—

> fix, by official order * * * the minimum wholesale and retail prices * * * to be charged for milk sold within any milk marketing area of the Commonwealth, whereso-ever produced * * *.

And Section 807 provides that

> After the commission shall have fixed prices to be charged or paid for milk * * * it shall be unlawful for a milk dealer or producer to sell or buy * * * milk at any price below the minimum price * * * applicable to the particular transaction.

Sections 1001 and 1002 provide for penalties to be imposed upon "any person violating any provision of this act, or any rule, regulation or order of the commission lawfully made." Administrative recognition that the statute imposes obligations upon purchasers as well as sellers is to be found in Section 4 of the Commission's Milk Control Order A–14 (R. 27), which the court below held to be applicable here:

> The following shall be the minimum Retail and Wholesale prices *charged by or paid to milk dealers* for fluid milk, skim milk, buttermilk, flavored milk and milk drink sold in bottles or other containers in Area 11. [Italics ours.]

And the 1941 amendments to the Milk Control Law remove any ambiguity that may have existed as to the impact of the regulation[7] by expressly forbidding any person to buy milk at less than the minimum price. Thus, the Pennsylvania law plainly recognizes the obvious truth that the regulation of the price term of a contract is unavoidably a regulation of buyer and seller alike. The statute and price orders of the commission are equivalent, therefore, in the circumstances here considered, to a direction to the United States not to purchase milk in Pennsylvania at prices below those specified by state authorities.

But even if we assume that the state price regulation is formally addressed to the milk dealer alone, nevertheless direct interference with the

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[7] Section 802 was amended specifically to authorize the commission to fix prices to be "received by milk dealers or handlers for milk sold" as well as prices "to be charged." Section 807 made it unlawful for "any other person" as well as a milk dealer, handler or producer to "buy or receive milk at any price below the minimum price * * * applicable to the particular transaction." And to make certain of the statute's application to governmental purchasers, the definition of "consumer" under Section 103 was amended to include "governmental persons." Act of July 24, 1941 (Act No. 177, P. L. 443, 31 P. S. §§ 700j–103, 802, 807).

federal function is its inescapable legal concomitant. What no dealer may sell at less than the minimum prices the United States cannot buy below such prices. This results from the consensual nature of a contract to sell.

In the instant case, for example, when the United States made public its desire to purchase milk and invited competitive bids, the Commission notified prospective bidders that an offer to sell or a sale of milk to the United States below the prescribed minimum prices would be construed as a violation of the State Milk Control Law. And after a contract was executed between the United States and Penn Dairies at a mutually satisfactory price, but below the state-prescribed minimum, the Commission refused, solely on that account, to renew Penn Dairies' license as a milk dealer, thus preventing it from continuing in business without incurring penalties (Milk Control Law, Secs. 401, 1001, 1002). If such action is valid no milk dealers in Pennsylvania can make any offer to the United States at a price below the minimum specified by the State Commission and continue in business; consequently, the United States will be effectively prevented from contracting for the purchase of milk at prices below such minimum. Contracts being consensual, the regulation of the price to be charged by the dealer *to* the United States is synonymous with a regulation of the price to be paid for milk *by* the United States in all its purchases. That the enforcement provisions of the

statute are aimed exclusively at the seller does not prevent the conclusion that the legal impact of the regulation is also upon the purchaser. Cf. *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95; *Alabama* v. *King & Boozer*, 314 U. S. 1, and see pp. 29–30, *infra*.

It is clear, therefore, that the price regulation must fall as an interference with a governmental activity of the United States. The Court has several times recognized that so vital a federal function as the purchase of supplies for the armed forces is within the protection of the constitutional immunity. In *Johnson* v. *Maryland*, 254 U. S. 51, 56, the Court cited army procurement as an unquestionable example of a federal activity which the states could not constitutionally regulate, quoting the *dictum* of Chief Justice Marshall in *Osborn* v. *United States Bank*, 9 Wheat. 738, 867:

> Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true, that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank. But we do not admit, that the act of purchasing, or of conveying the articles purchased, can be under state control. * * *

And *Ohio* v. *Thomas*, 173 U. S. 276, held that a state law requiring the display of a placard where oleomargarine was served could not be applied to a federal soldiers' home at which such food was furnished to inmates. Those decisions seem conclusive here.

Comparison of the purchase of milk for an army camp with the many other types of federal activity excluded from state control confirms this conclusion. In constructing a dam and reservoir authorized by Congress, the Secretary of the Interior cannot be required by state statute to secure approval of the plans and specifications by the state engineer, because "The United States may perform its functions without conforming to the police regulations of a State" (*Arizona* v. *California*, 283 U. S. 423, 451). A lien upon real estate in favor of the United States for taxes due under the internal revenue law is enforcible without compliance with a state law requiring recordation and timely enforcement (*United States* v. *Snyder*, 149 U. S. 210). Nor will an obligation owed to the United States be debarred from presentation against a decedent's estate because not filed within the time specified by state law (*United States* v. *Summerlin*, 310 U. S. 414). The driver of a mail truck for the United States Post Office Department cannot be required to comply with state licensing requirements (*Johnson* v. *Maryland*, 254 U. S. 51,

56),[8] nor can federal agents in a national forest and game preserve be subjected to the hunting restrictions promulgated by the state in which the preserve is located (*Hunt* v. *United States*, 278 U. S. 96).[9]

Appellee, in its Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, argued that the price order may be applied to purchases for the United States because it is not discriminatory. That view has been approved in several state cases; e. g., *Milk Control Board* v. *Gosselin's*

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[8] The Court in the *Johnson* case regarded the state regulation as seeking to impose upon drivers qualifications for Government service "in addition to those that the Government has pronounced sufficient." Compare, however, *Baltimore and Annapolis Railroad Co.* v. *Lichtenberg*, 176 Md. 383, which upheld a state requirement of a certificate from an independent contractor engaged solely in the carrying of passengers for the federal government. This Court dismissed the appeal "for want of a substantial federal question" (*sub nom. United States* v. *Baltimore & Annapolis R. Co.*, 308 U. S. 525). Later, the Court referred to that case as holding that the safety requirements of a state may be applied to trucks of an independent contractor transporting government employees under a contract with the United States. See *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 104. It should be noted that the regulation involved in the *Lichtenberg* case did not inevitably fall upon the United States but upon the contractor in his business.

[9] The Court's opinion in the *Hunt* case did not advert to the question whether the federal government had exclusive jurisdiction over the game preserve. In *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of the State of California*, No. 275, this Term, the Government's brief as *amicus curiae* discusses the application of the California price-fixing law to sales of milk to the United States upon a military reservation subject to exclusive federal jurisdiction.

Dairy, Inc., 301 Mass. 174; *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of the State of California*, 19 Cal. (2d) 818, pending on appeal as No. 275, this Term. But whatever may be the propriety of the test of discrimination in determining the validity of State tax laws applied to persons dealing with the United States, the decisions cited above (pp. 15–17, *supra*) make it clear that the test has no application to sustain the validity of a direct regulation of the activities of the United States itself. The State regulations which, as applied to the United States, were held unconstitutional were general statutes applicable to all persons within the jurisdiction of the State; and we shall show below that the cases dealing with State taxation do not sustain nondiscriminatory taxes whose direct legal incidence is upon the United States. In view of this continuous course of decisions pointing out that the States could not regulate the procurement of Army supplies, it cannot be supposed now that the failure of Congress expressly to forbid State regulation of procurement signifies a desire that the federal procurement officers should comply with nondiscriminatory state laws. Under those decisions, therefore, the Milk Control Law, and the Commission's orders thereunder, cannot be applied, in the absence of consent by Congress, to the purchase by the United States of its essential supplies.

As a matter of principle, too, it is immaterial that the State law is not discriminatory. The question

at hand concerns the distribution of the powers of government; it is, does the Constitution place the power in the States to fix the terms on which milk shall be purchased for the Army. Concededly, it might be sound policy and in the national interest for the federal government to require federal procurement officers, when they enter a state to purchase such supplies, to conform to state laws designed to effectuate reasonable local policies, particularly if the only effect of compliance is increased cost. On the other hand, it might be judged preferable from the viewpoint of the nation that federal procurement officers should give no effect to the diverse State programs, which may be based on considerations of local interest not consistent with national policy. But the choice between these alternatives, it is submitted, and the issuance of appropriate directions to the procurement officers by Congress or other authority are questions of policy with which the Court has no concern. Its province in the matter would seem clearly to be limited to the determination whether the Constitution vests in the States any power to give directions to the federal government as to the price it shall pay for supplies procured for the Army by its procurement officers as the result of negotiations between such officers and the citizens of the State. We submit that the states have surrendered that power to the national government. The Constitution reflects the determination of the Founders that the procurement of supplies for the Army is a mat-

ter of national concern to be regulated by the elected or appointed representatives of all the people and not to be controlled by single States in their local interests;[10] it vests the power "To raise and support Armies" in Congress and not in the states (U. S. Const., Art. I, Sec. 8, cl. 11). When Congress has not itself determined what prices federal procurement officers shall pay for necessary supplies, or established any policy in that regard for the Executive Department to follow, but has simply charged the Executive Department with the duty of procurement, then, we submit, Congress, in the exercise of the federal government's exclusive power over the Army, has remitted such questions of national policy not to the states for decision upon local considerations, but to the Executive Department, which in the exercise of the delegated power must determine whether to purchase supplies at prices conforming to state regulations or whether to obtain the lowest possible prices.

It is no answer to say that the states have retained their police powers and may, unless Congress forbids, exercise such powers even though the exercise affects the federal government. We assume that that is so, and that a state may, in the silence of Congress, regulate the conduct of its citizens in such a way that the economic repercussions of the regulation substantially affect the federal government. Cf. *Alabama* v. *King & Boozer*, 314

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[10] Cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 435–436; *Helvering* v. *Gerhardt*, 304 U. S. 405, 412.

U. S. 1; *Baltimore and Annapolis Railroad Co.* v. *Lichtenberg*, 176 Md. 383, appeal dismissed, 308 U. S. 525. In like manner the states may, in the silence of Congress, exercise their police powers in appropriate cases even though interstate commerce is affected. But where, as we have shown to be true here, the legal incidence of the regulation is on the United States because the state law itself fixes for local economic reasons the terms on which the United States may come into the state and purchase Army supplies from its citizens, then the state law passes beyond the life of local affairs and becomes a direct regulation of the United States and of the support of the Army. In like manner, a state regulation fixing the terms on which out-of-state goods may come into the state is a regulation of interstate commerce and therefore unconstitutional, even though it is not discriminatory and is in furtherance of a reasonable state policy (cf. *Baldwin* v. *Seelig*, 294 U. S. 511). In both cases the state law is invalid because it endeavors to exercise a power that the Constitution vested in the federal government exclusively because the questions of policy involved in its exercise are of national rather than local importance.[11]

[11] Even if pertinent, there is nothing to indicate that exclusion of federal purchases from the minimum price regulations would frustrate the objective of the state law, which is to provide an adequate price to the producer of milk in order to secure to the people of Pennsylvania an adequate and wholesome supply of milk (31 P. S., Sec. 700j). In normal times the amount of milk purchased by the federal

B. THE DECISIONS OF THIS COURT CONCERNING INTERGOVERNMENTAL TAX IMMUNITY ALSO SHOW THAT THE PRICE REGULATION IS INVALID BECAUSE ITS INCIDENCE IS ON THE UNITED STATES

The scope of intergovernmental immunity has been considered most frequently in the numerous cases testing the validity of state tax measures affecting the federal government, its property and its functions. The criteria there developed sustain *a fortiori* our position that the states may not regulate the contracts of the United States. For while the cases in which the benefit of intergovernmental tax immunity is claimed by private persons

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government would hardly be sufficient to undermine the entire program. In time of war or crisis the increased federal purchases would create a need for fixing maximum rather than minimum prices, as experience has shown to be the case. This is true for two reasons: First, it is the result of the operation of the law of supply and demand. Second, the increased federal purchases normally result in using as fluid milk a greater proportion of the total volume of milk produced, thus diminishing the surplus converted into milk products; it is the surplus that tends to bring down the price received by the producer. Moreover, exclusion of Government milk purchases from the state price-control system would still leave in effect the price maintenance at the producer level in respect of such milk. In the State of New York, the milk price laws impose price control solely at the producer level, concomitant price fixing at the retail level having been abandoned (N. Y. L. 1934, c. 126; N. Y. L. 1937, c. 383 and 876). We are informed by the United States Department of Agriculture that it has found price control at the producer level alone adequate to protect the interests of milk producers. See e. g. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 (New York City Milkshed); *H. P. Hood & Sons, Inc.* v. *United States*, 307 U. S. 588 (Boston Milkshed); *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110 (Chicago Milkshed).

who deal with the Government exhibit great diversity of reasoning and result,[12] the decisions involving a tax upon the United States, its instrumentalities, property or functions are marked by an unqualified uniformity. This Court has never held that the national government can be taxed by a state or local government in the absence of

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[12] A number of cases have been expressly overruled. Thus, *Long* v. *Rockwood*, 277 U. S. 142, overruled by *Fox Film Corp.* v. *Doyal*, 286 U. S. 123; *Gillespie* v. *Oklahoma*, 257 U. S. 501, and *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, overruled by *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376; *The Collector* v. *Day*, 11 Wall. 113, and *N. Y. ex rel. Rogers* v. *Graves*, 299 U. S. 401, overruled in *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466; cf. *Evans* v. *Gore*, 253 U. S. 245, and *Miles* v. *Graham*, 268 U. S. 501, apparently overruled by *O'Malley* v. *Woodrough*, 307 U. S. 277. The views expressed in *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, and *Graves* v. *Texas Co.*, 298 U. S. 393, were said to be no longer tenable to the extent that they differed from those expressed in *Alabama* v. *King & Boozer*, 314 U. S. 1.

Other decisions have been distinguished on grounds so narrow as to cast doubt upon the continuing validity of the earlier holding. Cf., e. g., (1) *Brush* v. *Commissioner*, 300 U. S. 352, with *Helvering* v. *Gerhardt*, 304 U. S. 405; (2) *Dobbins* v. *Erie County*, 16 Pet. 435, with *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466; (3) *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570; and *Graves* v. *Texas Co.*, 298 U. S. 393, with *Alward* v. *Johnson*, 282 U. S. 509; *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572; and *James* v. *Dravo Contracting Co.*, 302 U. S. 134; (4) *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, with *Pacific Co.* v. *Johnson*, 285 U. S. 480.

In some instances, results have been reached in virtual contradiction of prior cases, albeit without overruling them. Compare, e. g., (1) *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, with *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (and see Justices Brandeis, Holmes, and Stone

Congressional consent.[13] Its sovereign immunity has been given effect whether the tax was levied directly upon property owned by the United States [14]

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dissenting in *National Life Ins. Co.* v. *United States*, 277 U. S. 508, 527); (2) *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, with *Liggett & Myers Co.* v. *United States*, 299 U. S. 383; (3) *Telegraph Co.* v. *Texas*, 105 U. S. 460, and *Williams* v. *Talladega*, 226 U. S. 404, with *James* v. *Dravo Contracting Co.*, 302 U. S. 134; (4) *Bank of Commerce* v. *New York City*, 2 Black. 620, and *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, with *Society for Savings* v. *Coite*, 6 Wall. 594; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103; and *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506.

There is probably no single decision exempting a private taxpayer from a nondiscriminatory tax for reasons of governmental immunity which can with confidence be said to be controlling today.

[13] Two unreported cases affirmed by an equally divided Court at the December Term, 1849, are the only indication that the complete immunity of the United States from tax has ever been seriously questioned by the Court. Their facts are stated in *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 175–177. One, *United States* v. *Portland*, resulted in the dismissal of a suit by the United States to recover taxes paid on a customs building; the other, *Roach* v. *Philadelphia County*, affirmed a state court decision that the United States Mint was subject to local taxation. These inexplicable decisions, as pointed out in the *Van Brocklin* case, have no weight as authority.

[14] State or local taxes may not be laid upon such federally owned property as public lands prior to patent or passage of equitable title to private persons (*Colorado Company* v. *Commissioners*, 95 U. S. 259; *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600; *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504; *Irwin* v. *Wright*, 258 U. S. 219), lands held in trust for Indians (*United States* v. *Rickert*, 188 U. S. 432); and even land acquired by the United States to enforce the payment of taxes (*Van Brocklin* v.

or one of its instrumentalities,[15] or was imposed upon a transaction engaged in by the Government or its instrumentality.[16]

The recent decisions of this Court narrowing the scope of intergovernmental tax immunity do not cast doubt upon the complete immunity of the United States from tax. Each of those cases involved a tax on a private taxpayer which he was not obliged by the law to shift to the United States. In none of the cases denying immunity,

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State of Tennessee, 117 U. S. 151). Nor may lands sold by the United States to a private purchaser be reassessed for the period of federal ownership (*Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643).

[15] *Clallam County* v. *United States*, 263 U. S. 341, 344 (property of wholly-owned Government corporations); *New Brunswick* v. *United States*, 276 U. S. 547 (equitable interest of wholly-owned Government corporation). In *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209, the Reconstruction Finance Corporation was held subject to state taxation on national bank shares which it held, on the ground that Section 5219 of the Revised Statutes permitted such taxation. The Act of March 20, 1936 (c. 160, 49 Stat. 1185, 12 U. S. C., § 51d), apparently extended to the Reconstruction Finance Corporation a retroactive as well as prospective immunity from such taxation. The constitutionality of its retroactive features is challenged in *Maricopa County, Arizona* v. *The Valley National Bank*, No. 449, this Term.

[16] The recording of a mortgage by the United States is not subject to state tax. See *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 627; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 389; cf. *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 150; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477. Equally immune are transactions of a federal instrumentality such as a national bank. *Osborn* v. *United States Bank*, 9 Wheat. 738; *McCulloch* v. *Maryland*, 4 Wheat. 316.

including *Graves* v. *N. Y. ex rel. O'Keefe,* 306 U. S. 466, and *Alabama* v. *King & Boozer,* 314 U. S. 1, was the tax imposed upon the sovereign. On the contrary, the opinion in *Alabama* v. *King & Boozer* is based on the underlying assumption that a sales tax the legal incidence of which was on the United States would be invalid. The principal inquiry was whether the state sales tax was imposed by law on the United States or on its contractor, and, having concluded that the tax was imposed on the contractor, the court sustained its validity regardless of the fact that "it is passed on economically." The principle involved in that decision is entirely consistent with its well-settled converse stated above, that if the tax is imposed upon the United States it will be held invalid regardless of whether it is nondiscriminatory and no matter how slight may be its actual burden. The doctrine of the tax cases, therefore, if applied in the field of state regulation, shows to be invalid any law which directly controls or restricts the United States in the performance of a federal function. And it seems clear that the state cannot regulate what it cannot tax, regardless of whether the converse is true.

The court below sustained the Commission's minimum price order by applying the test utilized in *Alabama* v. *King & Boozer*—that is, whether the "legal incidence" of the regulation is upon the contractor or upon the United States. We submit that the court below erred in concluding that the "legal

incidence" of the Milk Control Law was upon the contractor alone within the meaning of this test. If the law provided *in haec verba* that "the United States may not purchase milk in Pennsylvania except at prices fixed by the State Commission"[16], its legal incidence upon the United States would be patent. By fixing the prices which may be charged to the United States, the effect of the Milk Control Law is the same as if the United States itself had been directly addressed by the law. The terms of a contract, which is consensual, cannot be regulated without regulating buyer and seller alike; the "legal incidence" of the regulation is on the agreement and therefore on both parties to it.

This truism distinguishes *Alabama* v. *King & Boozer* from the instant case. There the tax was required by law to be passed on by the seller to the contractor, but nothing in the state law required the contractor to pass it on to the United States.[17] If the contractor had been required by law to collect the tax from the other party to the contract, the latter would have been the taxpayer in law, as "the person ultimately liable for the tax itself."[18] Like a revenue law imposing a tax upon

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[17] A situation comparable to the *King & Boozer* case would exist if the challenge here were to state regulation of prices to be paid to producers by dealers selling to the United States.

[18] *Colorado Bank* v. *Bedford*, 310 U. S. 41, 52; *Stahmann* v. *Vidal*, 305 U. S. 61. Where the statute demonstrates a clear intention that the purchaser shall pay the tax, im-

the seller which he is required to pass on to the buyer, a regulation fixing the price which the seller must charge as a matter of law forces him to exact that price from the buyer and places the burden on the buyer.

The analogy of the tax cases, therefore, instead of supporting the decision below, actually sustains the proposition that the Pennsylvania milk control law impinges upon federal activities so immediately as to be invalid. In applying the test whether the "legal incidence" of the tax was upon the contractor, the court below placed reliance upon the fact that in the instant case the state law is in terms directed to the seller alone, saying (R. 84):

> No attempt is made in the law or in the Order of the Board to give any order or direction to the [federal] Reservation or its officers. The incidence of the law is upon dealers of milk. Although enforcement of the law against such dealers affects the price of milk to the Reservation as to others, yet that result is in its nature incidental. * * *

But for the reasons stated the failure to mention buyers in the statute cannot conceal the fact that it impinges on them as directly and immediately as if orders were given to them expressly, and

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mediately or ultimately, its burden is upon the purchaser. Cf. *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33; *Colorado Bank* v. *Bedford*, 310 U. S. 41. State courts, interpreting their own tax statutes, have reached the same conclusion. E. g., *Jewel Tea Co.* v. *State Tax Commissioner*, 70 N. D. 229.

that therefore, in the instant case, its legal incidence is on the United States. (See pp. 12–15, *supra*.) The legal incidence of state laws, and hence their constitutionality, turns upon their operation and not upon any form of words.[19]

Nor would it be material to the essential issue here that no prohibitions and no penalties are levelled at purchasers and that the licensing of milk dealers is the principal instrument for enforcement of the Milk Control Law (see Sections 401–406, 701–702) and the only sanction here invoked. That the impact of the enforcement machinery is not determinative of where the legal burden of the regulation falls has been settled by this Court. In *Alabama* v *King & Boozer, supra,* the state sales-tax statute made the seller the nominal taxpayer and constructed the collection system around him. The law required the seller to collect the tax from the buyer and subjected the seller to penalties, including loss of the right to continue in business, for failure to pay or collect the tax; but it imposed no penalties on the buyer for failure to pay the tax to the seller. Nevertheless, the legal incidence of the tax was held to fall upon the buyer, who ultimately had to pay it.[20] In

[19] Cf. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443–444; *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 280; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387.

[20] This had also been the holding of the State Supreme Court in that case. See also *Tanner* v. *State*, 190 So. 292 (Ala. Ct. App. 1939), affirming a conviction of a seller who had failed to collect the tax from the buyer.

Federal Land Bank v. *Bismarck Co.*, 314 U. S. 95, the sales tax involved was collected by the state from the seller, but constituted a debt from the buyer to the seller. The statute imposed penalties upon a seller for advertising that any part of the tax had been absorbed by him, but no penalties were imposed on the buyer for failure to pay the tax. The North Dakota Supreme Court held the tax to be laid upon the purchaser, and this Court accepted that conclusion, holding that the tax could not apply to sales to the Federal Land Bank in view of its statutory exemption from state taxation. On many other occasions, this Court has recognized that the legal impact of a state tax does not depend on the person from whom it is collected nor the means by which it is enforced.[21]

The price regulation here involved, therefore, does not rest exclusively upon the contractor, as did the sales tax which was upheld in the *King & Boozer* case. The regulation impinges upon the federal government as fully and directly as did the sales tax invalidated in *Federal Land Bank* v. *Bismarck Co.*, which was required by law to be passed on to the purchasing land bank. Accord-

[21] *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33 (sales tax), and *Colorado Bank* v. *Bedford*, 310 U. S. 41 (tax on services), held the state tax to be imposed on the buyer although collected from the seller. Cf. also *McCulloch* v. *Maryland*, 4 Wheat. 316; *Crandall* v. *State of Nevada*, 6 Wall. 35; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21.

ingly, the decisions of this Court in tax cases, like the decisions involving state regulations, require reversal of the decision below.

II

THE PENNSYLVANIA REGULATION IS INCONSISTENT WITH FEDERAL LAW REGULATING PURCHASES BY THE UNITED STATES AND THEREFORE CANNOT CONSTITUTIONALLY APPLY TO SUCH PURCHASES

An additional ground for holding the decision below to be erroneous is that Congress has regulated federal purchases in a way essentially inconsistent with the Pennsylvania price regulation. The policy of the federal competitive bidding statutes, and the purchasing procedure adopted under the authorization of Title II of the First War Powers Act, 1941, 55 Stat. 838, cannot be harmonized with the application of the Pennsylvania Milk Control Law to federal purchases. Since Congress undoubtedly has power to regulate the subject, the inconsistent state regulation must yield. U. S. Const., Art. VI; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Florida* v. *Mellon*, 273 U. S. 12. Cf. *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148.

A. FEDERAL COMPETITIVE BIDDING STATUTES

Long before the enactment of the Pennsylvania Milk Control Law, Congress established a mandatory procedure for the award and execution

of procurement contracts. Under Section 3709 of the Revised Statutes (12 Stat. 220, 41 U. S. C. § 5), "all purchases and contracts for supplies" for any of the Government departments must be made by advertising in advance for proposals (except as otherwise provided by law, or when immediate delivery is required by the public exigency). Similarly, Congress has required that purchases of military supplies (except in cases of emergency or where it is impractical to secure competition or where otherwise provided by law) shall be made after advertisement, and that "the award in every case shall be made to the lowest responsible bidder for the best and most suitable article" (Act of July 5, 1884, c. 217, 23 Stat. 109, as amended; Act of March 2, 1901, c. 803, 31 Stat. 905, as amended; 10 U. S. C. §§ 1200, 1201). Some statutory exceptions to these requirements have been made in the case of small purchases, and in other special circumstances; and recently the First War Powers Act has permitted waiver of the competitive bidding restrictions (see pp. 37–38, *infra*). Nevertheless, the award of procurement contracts to the lowest responsible bidder after advertisement for proposals is generally the required procedure.[22] It was pursuant to that pro-

[22] "The provisions of section 3709 are in the line of a wise public policy, insuring to the Government the advantage of competition in making contracts" (22 Op. Atty. Gen. 1, 6). The agents of the Government are bound to accept the lowest responsible bid or reject all and readvertise. *Scott* v. *United*

cedure that the milk purchase contract here involved was awarded to Penn Dairies as the lowest competitive bidder (R. 47–48, 51–55).

But it is clear that if minimum prices established under state authority bind bidders for Government contracts, there will be no *"lowest* responsible bidder", for where the minimum fixed by state law is above the economic minimum, several bidders will quote the fixed price. Thus, the United States will be denied the full benefit of price competition, which is a prime objective of the bidding laws,[23] whenever minimum prices fixed by law are above the price range under competitive conditions. And since minimum price laws are enacted to prevent low prices resulting from competition, that will generally be the result. An example in point is the bid of Penn Dairies which, although below the fixed minimum price, was economical;[24] and other bids below the minimum, or even below that of Penn Dairies, may

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States, 44 C. Cls. 524, 527. These provisions are mandatory and contracts made in violation thereof are void. *United States* v. *Ellicott*, 223 U. S. 524, 543; *Schneider* v. *United States*, 19 C. Cls. 547, 551; *cf. United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318.

[23] See *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318; *United States* v. *Brookridge Farm, Inc.*, 111 F. (2d) 461, 463 (C. C. A. 10); 38 Op. Atty. Gen. 452, 455.

[24] It was stipulated before the Commission that the profit which Penn Dairies would "realize from the sale of the quantities covered by said contract, if sold at prices fixed by said order, would be a profit materially in excess of any margin of profit necessary to maintain stability in the milk industry" (R. 23).

have been discouraged by the Commission's warning to milk dealers that quotations and sale at less than minimum prices would constitute a violation of the law. Nor is it an answer to say, as did the court below (R. 85) that the state law "does no more than put all bidders on an equal footing with regard to the minimum price." Price competition is the essence of competitive bidding in any true sense.

To subject federal purchases to state price regulation would also be inconsistent with other important purposes of the statutory procurement procedure. Besides securing the lowest competitive price, these laws were intended "to give all persons equal rights to compete for Government contracts" and "to prevent unjust favoritism" (*United States* v. *Brookridge Farm, Inc.*, 111 F. (2d) 461, 463 (C. C. A. 10)). A price level fixed above the potential prices of low-cost milk concerns, for orders of the size usual in the case of Government purchases, will result in many proposals at the minimum figure, thus eliminating the price differential which is the soundest basis for the award to one of several competing bidders and opening the door to the favoritism implicitly condemned by the federal statutes.[25]

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[25] See Lemke, *Legislative Price-Fixing and the Competitive Bidding Requirement in Government Contracts* (1940), 8 Geo. Wash. L. Rev. 955. If identical bids are received as the result of collusion among the bidders, the purposes of competitive bidding are defeated and all bids may be rejected. 39 Op. Atty. Gen. 71; 39 Op. Atty. Gen. 93.

The court below and the Supreme Court of California in the *Pacific Coast Dairy* case (No. 275, this Term), both relied upon the exception made in the federal competitive biding statutes for cases "where it is impracticable to secure such competition". The latter court also cited "Regulation 5-240 (g) (3)" of the United States Army in support of its proposition that it is impracticable to secure such competition "when the price is fixed by Federal, State, municipal, or other competent authority" (R. 26). But the record in the instant case,[*] shows that provision was not intended, and is not construed by the War Department, either to excuse competitive bidding where a state has fixed prices for the commodity or

[*] In a letter of April 21, 1941, to the Attorney General, the Under Secretary of War expressly rejected any interpretation of paragraph 4 (g) (3) of Army Regulation No. 5-240 (the provision cited by the court below) "as a recognition on the part of the War Department that states and their local governmental units are authorized to fix the prices at which commodities and services can be sold to the United States" and expressly denied the applicability of the regulation "to cases of procurement after advertising," the procedure followed both in the *Pacific Coast Dairy* case and in the case at bar (R. 66-67). The Judge Advocate General of the Army confirmed this construction of paragraph 4 (g) (3), limiting it "to cases where there is only one available source of supply" (R. 71). Indeed, since 1935, "the War Department has consistently taken and maintained the position that price-fixing measures of the states have no application to procurements by the War Department" (R. 72). However, in order to avoid misapprehension (R. 72), paragraph 4 (g) was amended on May 10, 1941, to omit any mention of governmental price fixing (R. 73-74).

service, or to concede the validity of such prices as applied to federal purchases. And the statutory exception shows on its face that it is intended only to cover instances where the agency involved finds it impractical to secure bids for some such reason as that only one source of supply is available; the exception is not intended to delegate to the states power to supersede the general congressional policy.

There are, moreover, other indications that Congress did not intend federal procurement policies established by it to yield to minimum price regulation. Section 218 of the Motor Carrier Act of 1935 requires that contract carriers by motor vehicle file with the Interstate Commerce Commission schedules of minimum charges for transportation in interstate commerce, and prohibits charging rates less than those contained in such schedules. Since the statute was silent as to its applicability to rates to be charged the United States, the Secretary of War requested the Attorney General's opinion on this question. The latter replied that section 218 did not apply to Government contracts, and therefore "contract carriers by motor vehicle may quote to the Government lower rates than those contained in their schedules on file with the Interstate Commerce Commission." (38 Op. Atty. Gen. 452, 456.) The Attorney General based his conclusion in part on the ground that observance of the minimum

price regulation would be contrary to the public policy expressed in the federal competitive bidding statutes. While this is an illustration of federal minimum price regulation, it seems inconceivable that Congress, which did not intend its procurement program to be subjected to a national minimum price policy, nevertheless intended to subject it to the diverse price policies of the states.

B. PROCEDURE UNDER THE WAR POWERS ACT

While the necessities of war have compelled some relaxation of the competitive bidding requirements for public procurement, the Pennsylvania price regulation also conflicts with the emergency methods of purchase. Title II of the First War Powers Act, 1941, 55 Stat. 838, empowers the President to authorize Government agencies exercising functions related to the war effort "to enter into contracts * * * without regard to the provisions of law relating to the making * * * of contracts." By Executive Order No. 9001 of December 27, 1941 (6 F. R. 6787), the President authorized the War and Navy Departments and the United States Maritime Commission to exercise such powers, and provided that in the absence of any other limitation fixed by law—

> the fixed fee to be paid the Contractor as a result of any cost-plus-a-fixed-fee contract entered into under the authority of this

> Order shall not exceed seven per centum of the estimated cost of the contract * * *. (Tit. II, sec. 7)[27]

A minimum price to be charged uniformly by all distributors, regardless of their individual costs, may of course be more than the "cost plus a fixed fee" envisaged by the Executive Order.[28] And since the state law is inconsistent with the federal regulation, the former must yield.

---

[27] The provisions of Executive Order No. 9001 were subsequently extended to contracts of the following agencies: Treasury Department, Department of Agriculture, Federal Works Agency, Panama Canal, Government Printing Office, National Advisory Committee for Aeronautics, Department of the Interior, Tennessee Valley Authority, Office of the Coordinator of Inter-American Affairs, Civil Aeronautics Administration, National Housing Agency, Veterans' Administration, Federal Communications Commission, Office of Scientific Research & Development in the Office for Emergency Management, Federal Prison Industries, Inc., Board of Economic Warfare, Office of Strategic Services, United States Joint Chiefs of Staff. See Executive Orders Nos. 9023, 9055, 9058, 9116, 9219, 9221, 9223, 9241.

[28] The Pennsylvania Milk Control Law requires the Commission to base milk prices "upon all conditions affecting the milk industry in each milk marketing area, including the amount necessary to yield a reasonable return to the producer, which return shall not be less than the cost of production and a reasonable profit to the producer, and a reasonable return to the milk dealer or handler. In ascertaining such returns, the commission shall utilize a cross-section representative of the average or normally efficient producers and dealers or handlers in the area" (Sec. 801, as amended; Penna. Stat. Ann. (Purdon, 1930), Tit. 31, § 700j–801).

CONCLUSION

For the reason that the application of the minimum prices fixed by the Commission under Pennsylvania law to purchases of milk by the federal government constitutes an unauthorized interference with a federal function, and runs counter to national policy as expressed in Acts of Congress, it is respectfully submitted that the decision of the court below should be reversed.

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DECEMBER 1942

APPENDIX

Pertinent Constitutional and Statutory Provisions

A. *The Federal Constitution*

Article I of the Constitution of the United States provides, in part, as follows:

> Section 8. The Congress shall have Power
>
> * * *
>
> To declare War * * *
> To raise and support Armies * * *
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI of the Constitution provides, in part, as follows:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> * * * * *

B. *Federal statutory provisions*

Section 3709 of the Revised Statutes of the United States, derived from the Act of March 2, 1861, 12 Stat. 220, 41 U. S. C. § 5, provides:

SEC. 3709. All purchases and contracts for supplies or services, in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. * * *

The more specific provisions, which govern the making of contracts for Army supplies, are contained in Title 10 of the United States Code as §§ 1191–1225. The provisions of §§ 1200 and 1201 are as follows:

§ 1200. *Letting contracts for quartermaster supplies; reports to Secretary of War.* All purchases of regular and miscellaneous supplies for the Army furnished by the Quartermaster Corps for immediate use shall be made by the officers of such corps, under direction of the Secretary of War, at the places nearest the points where they are needed, the conditions of cost and quality being equal: *Provided*, That all purchases of said supplies, except in cases otherwise provided for, and except in cases of emergency, which must be at once reported to the Secretary of War for his approval, shall be made by contract after public notice of not less than ten days for small amounts for immediate use, and of not less than from thirty to sixty days whenever, in the opinion of the Secretary of War, the circumstances of the case and conditions of the service shall warrant such extension of time. The award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right

being reserved to reject any and all bids. (July 5, 1884, c. 217, 23 Stat. 109; Aug. 24, 1912, c. 391, § 3, 37 Stat. 591.)

§ 1201. *Advertisement for proposals; considerations governing letting of contracts.* Except in cases of emergency or where it is impracticable to secure competition, or in cases otherwise provided for, the purchase of all supplies for the use of the various departments, and posts of the Army and of the branches of the Army service shall only be made after advertisement; and said supplies shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered. (Mar. 2, 1901, c. 803, 31 Stat. 905; June 30, 1902, c. 1328, 32 Stat. 514.)

C. *The Pennsylvania Milk Control Law*

Pertinent provisions of the Pennsylvania Milk Control Law of April 28, 1937, P. L. 417, are as follows:

Section 101. Legislative Purpose.—In the exercise of the police power of the Commonwealth, it is hereby declared that the production, transportation, manufacture, processing, storage, distribution, and sale of milk in the Commonwealth is a business affecting the public health and affected with a public interest, and it is hereby declared that this act shall be and is hereby enacted for the purpose of regulating and controlling the milk industry in this Commonwealth, for the protection of the public health and welfare and for the prevention of fraud.

* * * * * *

Section 103. Definitions; Construction.—The following terms shall be construed in this act to have the following meanings, except in those instances where the context clearly indicates otherwise:

"Commission" means the State agency created by this act, to be known as the "Milk Control Commission."

"Consumer" means any person, other than a milk dealer, who purchases milk for consumption or use.

* * * * *

"Person" includes an individual, corporation, association, partnership, limited partnership, or other unincorporated enterprise owned by two or more individuals.

* * * * *

Section 401. Milk Dealers Required To Be Licensed.—Except as herein otherwise specifically provided, a milk dealer, as defined in this act, shall not buy milk from producers or others within this Commonwealth for storage, manufacture, processing, distribution, or sale within or without this Commonwealth, or sell or distribute milk within this Commonwealth, unless such dealer be duly licensed as herein provided; and it shall be unlawful for a milk dealer to buy milk from, or sell milk to, a milk dealer who is not either licensed or exempted as herein provided, or, in any way, to deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this act.

* * * * *

Section 404. Grounds for Refusal, Suspension or Revocation.—The commission shall grant a license to an applicant complying with the provisions of this act and

the rules, regulations and orders issued by the commission pursuant thereto. The commission may decline to grant a license to an applicant, or may suspend, revoke or refuse to transfer a license already granted to a milk dealer, or may prohibit a milk dealer exempted from the license requirements of this act from continuing to operate as a milk dealer, after determination by the commission that the dealer:

* * * * *

(10) Has violated any of the provisions of this act, or any of the rules, regulations or orders of the commission, or any stipulation entered into between the said dealer and the commission in the course of any proceeding before the commission;

* * * * *

Section 801. Requisites of Orders Fixing Price of Milk.—The commission shall ascertain, after a hearing in which all interested parties shall be given reasonable opportunity to be heard, the logical and reasonable milk marketing areas within the Commonwealth, shall describe the territorial extent thereof, shall designate such areas by name or number, and shall ascertain and maintain such prices for milk in the respective milk marketing areas as will be most beneficial to the public interest, best protect the milk industry of the Commonwealth and insure a sufficient quantity of pure and wholesome milk to inhabitants of the Commonwealth, having special regard to the health and welfare of children residing therein.

The commission shall base all prices upon all conditions affecting the milk industry in each milk marketing area, in-

cluding the amount necessary to yield a reasonable return to the producer and to the milk dealer.

The commission shall file at its office, with each order issued, a general statement in writing of the findings of fact in support of, and the reasons for, such order.

The commission may, upon its own motion or upon application in writing, from time to time, alter, revise or amend an official order defining milk marketing areas or fixing prices to be charged or paid for milk. Before making, revising or amending any order defining milk marketing areas or fixing prices to be charged or paid for milk, the commission shall hold a hearing, after giving reasonable notice thereof to interested persons, of whom the commission has notice, and, in the case of any order affecting the public, after giving reasonable notice thereof to the public in such newspaper or newspapers as, in the judgment of the commission, shall afford sufficient notice and publicity: Provided, however, That upon application in writing from a person aggrieved by an order of the commission hereunder, filed within fifteen (15) days after the issuance of the order complained of, or upon its own motion, the commission may, within twenty (20) days after the effective date of such order, issue an order revising or amending such order without a further hearing, if such revision or amendment is based on the record of the hearing held prior to the issuance of such order.

Every order made pursuant to this article, and any revision or amendment thereof, in which the commission fixes or changes the price of milk to producers or

to consumers, or both, shall be subject to the approval of the Governor.

Section 802. Wholesale and Retail Prices.—The commission shall fix, by official order (except as hereinafter provided in this section), the minimum wholesale and retail prices, and may fix, by official order, the maximum wholesale and retail prices, to be charged for milk sold within any milk-marketing area of the Commonwealth, wheresoever produced, including milk sold by:

(1) Milk dealers to other milk dealers;

(2) Milk dealers to consumers;

(3) Milk dealers to stores, either for consumption on the premises or resale to consumers;

(4) Stores to consumers, except for consumption on the premises where sold.

Nothing herein contained shall be construed to empower the commission to fix the price at which milk may be sold by any milk dealer or producer to consumers for consumption on the premises of such milk dealer or producer.

* * * * * *

Section 803. Prices to Producers.—The commission shall fix, by official order, the minimum prices to be paid by milk dealers to producers for milk: Provided, however, That the fixing of prices to be paid by milk dealers to producers for milk to be used solely in manufacturing shall be discretionary with the commission.

Section 804. Classification.—When, pursuant to any statute or regulations or orders adopted thereunder, or any ordinance or reasonable trade practive, vari-

ous grades of milk are specified, orders of the commission fixing minimum or maximum prices may be applicable to each grade. Orders of the commission fixing minimum or maximum prices may vary in different markets, and shall designate the markets to which applicable. Such orders may likewise classify milk and milk dealers in any reasonable manner which the commission deems advisable, and may vary according to the classes to which they are applicable. The orders of the commission with respect to the minimum prices to be paid to producers and others shall apply to the area in which the milk is produced, or to the area in which the milk so produced is sold, and may vary in different areas according to varying uses, grades and conditions. Each such order may classify such milk by forms, classes, grade or uses, as the commission may deem advisable, and may specify the minimum prices therefor. Other reasonable methods of classification may be prescribed by the commission.

Section 805. Price Increases.—It is hereby declared to be the legislative intent that the benefits of any increase of prices received by milk dealers, by virtue of the minimum price provisions of this article, shall be given to producers, except in any case where the commission deems a deviation from this policy necessary in order lawfully to maintain proper milk markets and outlets for producers and consumers. The commission shall, whenever it deems such action necessary, issue orders, rules or regulations to effectuate this intent.

* * * * *

Section 807. Violations—After the commission shall have fixed prices to be charged or paid for milk, whether by class, grade, use or otherwise, it shall be unlawful for a milk dealer or producer to sell or buy, or offer to sell or buy, milk at any price below the minimum price or above the maximum price applicable to the particular transaction.

No method or device shall be lawful whereby milk is bought or sold, or offered to be bought or sold, at a price less than the minimum price applicable to the particular transaction, whether by any discount, premium, rebate, free service, advertising allowance, or extension of credit, or by a combined price for such milk, together with another commodity or a service which is less, or is represented to be less, than the aggregate of the price of the milk and the price or value of such commodity or service when sold or offered for sale separately or otherwise.

Purdon's Penna. Stat. Ann. (1930), Title 31, provides in part:

§ 700j-1001. Summary offenses.

Except as otherwise specially provided in this act, any person violating any provision of this act, or any rule, regulation or order of the commission lawfully made, shall for each offense, upon conviction thereof in a summary proceeding, be sentenced to pay the costs of prosecution and a fine of not less than twenty-five dollars ($25.00) nor more than three hundred dollars ($300.00), and, in default thereof, to undergo imprisonment of not less than ten (10) days nor more than thirty (30) days. (1937, April 28, P. L. 417, art. X, § 1001.)

§ 700j–1002. Misdemeanors.

For a third or subsequent offense, any person violating any provision of this act, or any rule, regulation or order of the commission lawfully made, shall be guilty of a misdemeanor and shall, upon conviction thereof, be sentenced to pay a fine of not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000.00), or to undergo imprisonment not exceeding one (1) year, or both, in the discretion of the court. (1937, April 28, P. L. 417, art. X, § 1002.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 399

PENN DAIRIES, INC., AND THE UNITED STATES OF AMERICA,

Appellants,

vs,

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

CLAUDE T. RENO,
Attorney General of Pennsylvania;
FRANK E. COHO,
Deputy Attorney General of Pennsylvania,
Counsel for Appellee.

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IN THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

PENN DAIRIES, INC.,

Appellant,

AND

THE UNITED STATES OF AMERICA,

Intervenor-Appellant,

vs.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA.

January Term, 1942, No. 173.

(Appeal of the Penn Dairies, Inc., in Which the United States Has Intervened.)

January Term, 1942, No. 180.

(Appeal of the United States)

STATEMENT AGAINST JURISDICTION OF SUPREME COURT OF THE UNITED STATES AND MOTION TO DISMISS OR AFFIRM APPEAL.

To the Honorable Chief Justice and Justices of the Supreme Court of the United States:

In accordance with Rule 12, paragraph 3, of the Supreme Court of the United States, the Milk Control Commission

of the Commonwealth of Pennsylvania hereby sets forth its reasons against jurisdiction of the Supreme Court of the United States in the above case and respectfully moves that Honorable Court to dismiss the appeal allowed by the Supreme Court of Pennsylvania or affirm its decision, as follows:

1. It is respectfully submitted that there is no substantial question involved, because Penn Dairies, Inc., is admittedly a contractor with and *not an employe or agent of* the Government of the United States. In *Baltimore and Annapolis Railroad Co. v. Lichtenberg, United States Intervener*, 176 Md. 383, 4 A. (2d) 734 (1939), an attempt was made to appeal from a decision of the Supreme Court of Maryland holding that a certificate to operate as a contract carrier was necessary for a contractor hauling employes of the Federal Government. The Supreme Court of the United States in *United States* v. *Baltimore and Annapolis Railroad Co.*, 308 U. S. 525, 60 S. Ct. 297 (1939), dismissed the appeal in the following language:

> "The appeal is dismissed for want of a substantial federal question."

This decision was cited with approval in *James Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 104, 60 S. Ct. 431 (1940).

2. There is no substantial federal question involved because there is admittedly *no discrimination between the United States and the State of Pennsylvania itself in the operation of the Milk Control Law*, and because no substantial burden is placed upon the United States by the operation of the Milk Control Commission. Any question of burden on the United States was resolved in favor of the Milk Control Commission of Pennsylvania by the decision of the Supreme Court of the United States in *Alabama* v. *King and Boozer*, 314 U. S. 1, 62 S. Ct. 43 (1941), and

Curry v. *United States*, 314 U. S. 14, 62 S. Ct. 48 (1941). In those cases a sales tax and a use tax, respectively, were upheld where the tax was imposed upon a contractor erecting an army camp for the United States under a "cost-plus" contract. In both cases the tax was upheld as no substantial burden upon the United States even though the amounts to be paid by the United States under the contracts were increased by the amount of the tax. An even more striking case is *United States* v. *Oklahoma Gas & Electric Co.*, 297 Fed. 575 (C. C. A. 8, 1924) in which it was held that the United States was bound to pay increased electric rates prescribed by a state rate-fixing commission even though the electric current was being supplied under a contract still in force for a lower rate at the time the rate change was made.

WHEREFORE, the Milk Control Commission of the Commonwealth of Pennsylvania, appellee, respectfully prays that the Supreme Court of the United States dismiss the appeal in the above cases to the Supreme Court of the United States or affirm the judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

(Signed) CLAUDE T. RENO,
Attorney General;
FRANK E. COHO,
Deputy Attorney General,
Attorneys for the Milk Control
Commission of Pennsylvania,
Appellee.

STATE OF PENNSYLVANIA,
County of Dauphin:

John M. McKee, being duly sworn according to law deposes and says that he is Chairman of the Milk Control

Commission of Pennsylvania, and that the facts set forth in the foregoing statement are true and correct.

JOHN M. McKEE.

Sworn to and Subscribed before me this 26th day of August, A. D. 1942.

LUCILLE A. STROUP,
Notary Public.

[SEAL.]

My Commission Expires March 5, 1943.

In The

Supreme Court of the United States

October Term, 1942

NO. 399

PENN DAIRIES, INC., AND THE UNITED STATES OF AMERICA,

Appellants,

vs.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellee.

Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

BRIEF FOR APPELLEE

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In The

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No. 399

Penn Dairies, Inc., and the United States of America, Appellants

v.

The Milk Control Commission of the Commonwealth of Pennsylvania

Appeal from the Supreme Court of the Commonwealth of Pennsylvania

BRIEF FOR THE APPELLEE

OPINIONS BELOW

The findings and order of the Milk Control Commission of Pennsylvania (R. 34-39) are not reported. The opinion and judgment of the Court of Common Pleas of Lancaster County, Pennsylvania (R. 56-66) are reported in 47 Lancaster (Pa.) Law Review 525. The opinion of the Superior Court of Pennsylvania (R. 79-85) and the dissenting opinion (R. 85-87) are reported in 148 Pa. Super. 261. The opinion of the Supreme Court of Pennsylvania (R. 94) is reported in 344 Pa. 635.

JURISDICTION

If the question presented is a substantial federal question, then, as stated in Appellants' Brief, the jurisdiction of the Supreme Court rests on Section 237 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

The question presented is well stated in Appellants' Brief, as follows:

> "Whether the minimum prices for purchases or sales of milk, established under the Pennsylvania Milk Control Law, may be applied to sales of milk by a distributor to the United States."

STATUTES INVOLVED

In addition to the constitutional provisions and statutes set forth in the Appendix to Appellants' Brief, the following are also involved:

A. The Constitution of the United States.

Amendment X to the Constitution of the United States provides as follows:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

B. United States statutes.

The Agricultural Marketing Agreement Act of 1937, Act of June 3, 1937, c. 296, 50 Stat. 246, re-enacting and validating certain provisions of the Agricultural Adjustment Act of May 12, 1933, c. 25, 48 Stat. 31, 7 U. S. C. section 601 et seq., provides, inter alia, for the fixing of prices to be paid producers for milk moving in or affecting interstate commerce. Section 10 (i) of that Act, 7 U. S. C. section 610 (i), provides:

> "The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this chapter and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities

or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: Provided, That information furnished to the Secretary of Agriculture pursuant to section 608d (1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 608d (2) of this title."

COUNTERSTATEMENT

To the Statement by Appellants at pages 2 to 7 of their brief, the following should be added:

The appellant Penn Dairies, Inc. is a milk dealer engaged in supplying many consumers in Pennsylvania other than United States officers or agents. (R. 40).

Official General Order No. A-34 of the Milk Control Commission was promulgated June 23, 1937, (R. 23); was approved by the Governor on June 24, 1937 (R. 31), and became effective July 1, 1937 (R. 24), all prior to the time that this case arose.

SUMMARY OF ARGUMENT

I

Milk dealers who are subject to regulation by a state are not freed of regulation by entering into contracts with officers of the United States. The fact that the United States is not subject to punishment for actively participating in a breach of state law does not enable the contractor also to escape punishment.

When the United States enters into contracts to obtain goods or services, it stands in the same position as a private contractor. It has a choice of entering into a contract, subject to the same disabilities as other contracting parties, or it may produce and furnish its own supplies. In the former case it is subject to the consequences of restrictions upon its contractors; in the latter case there are no restrictions.

II

Competitive bidding statutes are intended to assure the Government the most favorable terms consistent with responsible performance of its contracts. Where a state law provides a minimum price for milk, below which an adequate supply of wholesome milk cannot be assured, the competitive bidding statute fulfills its purpose if the minimum price is bid by a responsible contractor. Any lower price threatens the supply of the commodity needed, and if persisted in will compel the United States to enter the field of producing that commodity itself—which it apparently preferred not to do when it chose to purchase it.

ARGUMENT

I. ENFORCEMENT OF THIS MINIMUM PRICE ORDER IS NOT AN UNCONSTITUTIONAL INTERFERENCE WITH THE GOVERNMENT OF THE UNITED STATES

The constitutional provisions quoted by the appellant are not disputed. The question in this case is whether the Milk Control Commission has gone beyond the scope of the police power in requiring milk dealers operating in Pennsylvania to treat all consumers alike, whether they be officers of the United States or private individuals.

There is a fundamental distinction between the United States as a sovereign and the United States as a party to a contract. Although the Government can regulate its own officers upon its own premises exclusive of all state laws and can take over the operation of a business to carry out its governmental functions, when the Government enters into a contract with another party it does so in the same way as a private person and is generally entitled to the same rights but subject to the same obligations as other persons: COOKE *v.* UNITED STATES, 91 U. S. 389, 23 L. Ed. 237 (1875); CHRISTIE *v.* UNITED STATES, 237 U. S. 234, 35 S. Ct. 565, 59 L. Ed. 933 (1915); UNITED STATES *v.* SPEARIN, 248 U. S. 132, 39 S. Ct. 59, 63 L. Ed. 166 (1918); UNITED STATES *v.* ATLANTIC DREDGING Co., 253 U. S. 1, 40 S. Ct. 423, 64 L. Ed. 735 (1920);

UNITED STATES *v.* BETHLEHEM STEEL CORPORATION, 315 U. S. 289, 62 S. Ct. 581 (1942); E. E. NAYLOR—LIABILITY OF THE UNITED STATES GOVERNMENT IN CONTRACT, 14 Tulane Law Review 580, 583 (1940). As a Federal District Court recently held, "It is axiomatic that the Government must be held to the same general principles of equity and fair play in dealing with those who contract with it as are the contractors themselves." KEMP *v.* UNITED STATES, 38 F. Supp. 568, 570 (D. C. Md., 1941).

In UNITED STATES *v.* OKLAHOMA GAS AND ELECTRIC Co., 297 Fed. 575 (C. C. A. 8, 1924) the United States had made a contract with the Oklahoma Gas and Electric Company for the supply of electric current for illumination and power at certain rates. The current was to be supplied to the United States at its Fort Reno, Remount Depot in Oklahoma. During the period of time that the contract was in existence the Corporation Commission of Oklahoma fixed a general schedule of rates for electric current higher than those fixed in the contract. The company then refused to comply with the contract unless and until the United States paid the higher rates prescribed by the Commission. The United States filed a Bill in Equity to restrain the company from shutting off electricity and to compel the company to continue to supply electricity at the contract rate. The District Court refused the injunction and, on appeal, the order of the District Court was affirmed. No further appeal was taken. In the opinion of the Circuit Court, Judge Kenyon (297 Fed. at 578-579) said:

> "Further it is sound law that parties by contract cannot take from such Commission

the right granted it by a state to fix rates on service furnished by public utilities. If by contract the Commission could be prevented from increasing the rates, then likewise by contract it could be prevented from reducing them, and the regulation of the Commission set up and authorized by the Legislature to regulate rates of public utilities would be futile. * * *.

"It is claimed by appellant [United States] that the situation is different because the contract here is made by the government and not by an individual. * * *

"Here the government was contracting with one of its citizens to do a very common and ordinary thing not in any way relating to or involving its existence, viz., furnish electricity for lighting and motor power at Ft. Reno, Remount Depot. We see no reason why as to a contract of this nature the government should occupy any different position than if the same had been made between two of its citizens. * * *

"The question has received a like interpretation by the United States Court of Claims in Southern Pac. Co. v. United States, 28 Ct. Cl. 77, 105; Purcell Envelope Co. v. United States, 47 Ct. Cl. 1, 24.

"The trial court was correct in holding that the contract, as to rates, was subject to the decisions made by the Corporation Commission changing the same. The decree deny-

ing the injunction prayed for and dismissing the bill of appellant was correct and the same is affirmed."

In UNITED STATES *v.* BETHLEHEM STEEL CORPORATION, 62 S. Ct. 581 (1942), it was held that the Bethlehem Steel Corporation could recover from the United States moneys due under contracts with the United States to build ships during World War I. The United States claimed that the profits made by the ship builders were excessive and that the United States should be relieved from its obligation under the contract to pay the profits. In deciding against the United States, the Supreme Court said (62 S. Ct. at 589-591):

> "The Constitution Art. 1, Section 8 grants Congress power 'to raise and support Armies', 'to provide and maintain a Navy', and to make all laws necessary and proper to carry these powers into execution. Under this authority Congress can draft men for battle service. Selective Draft Law Cases (Arver v. United States), 245 U. S. 366; 38 S. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856. Its power to draft business organizations to support the fighting men who risk their lives can be no less. * * *
>
> "The profits claimed here arise under contracts deliberately let by the Fleet Corporation under authority delegated by the President in accordance with an act of Congress. Neither Congress nor the President restricted the freedom of the Fleet Corporation to grant measures of profits common at the

time. And the Fleet Corporation's chosen policy was to operate in a field where profits for services are demanded and expected. The futility of subjecting this choice of policy to judicial review is demonstrated by this case, coming to this Court as it does more than twenty years after the ships were completed. In any event, we believe the question of whether or not this policy was wise is outside our province to decide. Under our form of government we do not have the power to nullify it, as we believe we should necessarily be doing, were we to declare these contracts unenforceable on the ground that profits granted under Congressional authority were too high. The profits made in these and other contracts entered into under the same system may justly arouse indignation. But indignation based on the notions of morality of this or any other court cannot be judicially transmuted into a principle of law of greater force than the expressed will of Congress."

In the case of UNITED STATES *v.* PRESS PUBLISHING Co., 219 U. S. 1, 31 S. Ct. 212, 55 L. Ed. 65 (1911), it was held that a libel completed by publication upon United States land was punishable in the state courts and not in the federal courts because the acts leading up to the libel all took place on state land rather than upon land of the United States.

In the present case there is no contact with the Federal Government at all until the milk is delivered to the purchasing and contracting officer at Indiantown Gap. The cattle that produce the milk are in

and near Lancaster County. The milk is received, pasteurized, bottled and sent on its way by Penn Dairies, Inc., at its plant, within its property and in its own containers and conveyances. While the title may be said to pass only upon ultimate delivery, so in the Press Publishing Company case the libel was not complete until the publication on United States land.

The appellant Penn Dairies, Inc. held a license expiring April 30, 1941, and applied to the Milk Control Commission for a license to operate as a milk dealer during the license year beginning May 1, 1941. The present proceedings were brought to suspend or revoke the then existent license and to refuse application for the new license because of failure to charge the correct minimum price. It is proper to refuse a license on such grounds: PACIFIC COAST DAIRY INC., *v.* DEPARTMENT OF AGRICULTURE, 123 P. (2d) 442 (Cal. 1942); GAGNON *v.* DEPARTMENT OF AGRICULTURE AND MARKETS, 322 Wis. 259, 286 N. W. 549 (1939); KARSTEN DAIRIES *v.* BALDWIN, 243 App. Div. 656, 276 N. Y. Supp. 659 (1935). The United States has no interest in whether a particular milk dealer receives a license to operate under the laws of Pennsylvania. If the Federal Government so desires it can produce its own milk on its own land, with its own employes, and, of course, in such a case the Commonwealth of Pennsylvania would have no control over the manner in which the milk was produced: OHIO *v.* THOMAS, 173 U. S. 276, 19 S. Ct. 453 (1899).

There is no attempt by appellants to claim that Penn Dairies, Inc. is an employe of the United States Government. Its very application for a license shows

that it is not. The contract that was entered into is a contract between two independent parties and not a contract of hiring.

While officers and employes of the United States who are engaged in working for the United States are free from state regulations that would otherwise affect their employment (PITTMAN *v.* HOME OWNERS' LOAN CORPORATION, 308 U. S. 21, 60 S. Ct. 15 (1939); OHIO *v.* THOMAS, 173 U. S. 276, 19 S. Ct. 453 (1899), cited in Appellants' brief), this immunity does not extend to those who enter into contracts with the United States Government to furnish material or to render services: JAMES STEWART & Co. *v.* SADRAKULA, 309 U. S. 94, 105, 60 S. Ct. 431 (1940); JAMES *v.* DRAVO CONTRACTING Co., 302 U. S. 134, 152; 58 S. Ct. 208 (1937).

In JAMES STEWART & Co. *v.* SADRAKULA, 309 U. S. 94, 60 S. Ct. 431 (1940), it was held that decedent's administratrix was entitled to recover under Section 241 of the Labor Law of New York for the decedent's death while employed by a subcontractor engaged in the construction of the New York Post Office upon the land of the United States used for the Post Office. It was urged that since this was an undertaking for the Federal Government, the New York Law would not apply. It was claimed that the contractors enjoyed the immunity that the Federal Government would have enjoyed had its employes been engaged in the work. The Supreme Court of the United States dismissed this contention in the following words (309 U. S. at 105):

> "While, of course, in a sense the contract is the means by which the United States se-

cures the construction of its post office, certainly the contractor in this independent operation does not share any governmental immunity."

In Buckstaff Bath House Co. *v.* McKinley, 308 U. S. 358, 60 S. Ct. 279 (1939), it was held that the Arkansas Unemployment Compensation Law applied to an employer conducting a bath house for private profit upon federal land leased to a taxpayer. The court held that the bath house company was not relieved of the payment of state taxes because it was operating under a contract with the United States Government. In passing upon this question the Supreme Court said (308 U. S. at 362-363):

> "There can be no question but that petitioner is liable for the tax levied by Section 901 of the Social Security Act, unless it is exempted by that portion of Section 907 which relieves 'an instrumentality of the United States' from that duty. But it seems clear that the petitioner is not, within the meaning of the Social Security Act, such an instrumentality. The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter. Fidelity & D. Co. v. Pennsylvania, 204 U. S. 319. Petitioner's lease from the Secretary of the Interior did not convert it into such an instrumentality. Petitioner is engaged in its own behalf, not the government's, in the conduct of a private business for profit.' See Federal Compress & Warehouse Co. v. McLean, 291

U. S. 17, 23. Though it acts with the Government's permission, and has received a privilege from the Government, it does not exercise that privilege on behalf of the latter. See Broad River Power Co. v. Query, 288 U. S. 178, 180. The control reserved by the Government for protection of a governmental program and the public interest is not incompatible with the retention of the status of private enterprise. See Federal Compress & Warehouse Co. v. McLean, supra. That control, being wholly supervisory, is not to be differentiated from the type of control which the United States may reserve over any independent contractor without transforming him into an instrumentality. See James v. Dravo Contracting Co., 302 U. S. 134, 149. In effect, petitioner concedes the point by admitting its liability under the Social Security Act."

In Baltimore and Annapolis Railroad Co. v. Lichtenberg, United States Intervener, 176 Md. 383, 4 A. (2d) 734 (1939), appeal dismissed in 308 U. S. 525, 60 S. Ct. 297 (1939), it was held that the Public Service Commission of Maryland was entitled to enforce its order stopping operations of a contractor with the Federal Government until the contractor had obtained permits under the Maryland Code. In that case the contractor was engaged in carrying men for the Federal Government to their place of work for the Federal Government on certain public projects. The Public Service Commission of Maryland insisted that this contractor obtain a certificate for the carrying of passengers. The contractor was not otherwise engaged in the carrying of passengers. It was held

that the fact that the contractor was engaged in carrying passengers for the United States only did not excuse him from complying with the Public Service Commission Laws of Maryland. As to this matter the Supreme Court of Maryland said (176 Md. at 393, 4 A. (2d) at 738):

> "So much is our consideration of the objection that regulation or denial of permission to the appellees amounts to interference with performance of an essential governmental function. The court is of opinion that there is no such interference as is prohibited to the State by the United States Constitution. Only the use of the roads of the State by an independent contractor is dealt with. There is no interference with any governmental instrumentality. A private instrumentality is availed of by contract, its use of the roads for gain to be turned to the service of the Government. And, as already stated, the court sees no foundation for holding that the Government may, for its greater convenience or for the sake of economy, relieve the contractor of the obligation to conform to the law. Such an independent agency, engaged in its independent trade, must, in our opinion, be considered unchangeably subject to the law in its operation whether it contracts for its services with the Government or with promoters of private enterprises. See James v. Dravo Contracting Co., 302 U. S. 134, 149, 58 S. Ct. 208, 82 L. Ed. 155."

The United States attempted to appeal from this decision on the ground that this regulation of the

Maryland Public Service Commission interfered with the Federal Government: UNITED STATES v. BALTIMORE AND ANNAPOLIS RAILROAD Co., 308 U. S. 525, 60 S. Ct. 297 (1939). The Supreme Court of the United States dismissed the appeal in the following language:

> "The appeal is dismissed for want of a substantial Federal question."

This decision is cited with approval in JAMES STEWART & Co. *v.* SADRAKULA, 309 U. S. 94, at 104, 60 S. Ct. 431 (1940).

It will undoubtedly be contended by the United States that compliance with the minimum price orders of the Milk Control Commission will result in higher costs to the Federal Government. This may be true for an individual contract, but if the result of these contracts is to induce greater cut-throat competition among milk dealers competing for the Federal business, the final result may well be that all but the most financially able dealers will be driven out of business, and the Government ultimately required to pay higher prices brought about by a stifling of competition.

Regardless of this, however, the fact that in this particular instance the Federal Government may have to pay more than it would under the contract is not such a burden upon the Federal Government that the contractor is excused from obeying the order. This argument was pressed in the case of JAMES *v.* DRAVO CONTRACTING Co., 302 U. S. 134, 58 S. Ct. 208 (1937). On this point the Supreme Court of the United States said (302 U. S. at 159-160):

"The contention ultimately rests upon the point that the tax increases the cost to the Government of the service rendered by the taxpayer. But this is not necessarily so. The contractor, taking into consideration the state of the competitive market for the service, may be willing to bear the tax and absorb it in his estimated profit rather than lose the contract. In the present case, it is stipulated that respondent's estimated costs of the respective works, and the bids based thereon, did not include, and there was not included in the contract price paid to respondent, any specified item to cover the gross receipts tax, although respondent knew of the West Virginia act imposing it, and respondent's estimates of cost did include 'compensation and liability insurance, construction bond, and property taxes.'

"But if it be assumed that the gross receipts tax may increase the cost to the government, that fact would not invalidate the tax. With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work. Taxes may validly be laid not only on the contractor's machinery but on the fuel used to operate it. In Trinityfarm Constr. Co. v. Grosjean, 291 U. S. 466, the taxpayer entered into a contract

with the Federal Government for the construction of levees in aid of navigation and gasoline was used to supply power for taxpayer's machinery. A state excise tax on the gasoline so used was sustained. The Court said that if the payment of the state taxes imposed on the property and operations of the taxpayer 'affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate, or direct.' But a tax of that sort unquestionably increases the expense of the contractor in performing his service and may, if it enters into the contractor's estimate, increase the cost to the Government. The fact that the tax on the gross receipts of the contractor in the Alward case, [282 U. S. 509, 75 L. Ed. 496, 51 S. Ct. 273, 75 A. L. R. 9] supra, might have increased the cost to the Government of the carriage of the mails did not impress the Court as militating against its validity."

In that case the United States appeared as amicus curiae by special leave of court and filed a brief in support of the tax.

Likewise, in BALTIMORE AND ANNAPOLIS RAILROAD CO. *v.* LICHTENBERG, 176 Md. 383, 4 A. (2d) 734 (1939), above, it was held that the fact that the contract with the Government to carry its employes to the places where they were to do federal work could not be carried out until a permit had been obtained from the Maryland Public Service Commission did not relieve

the contractor from the necessity of obtaining the state permit.

In the present case there is a contract by a Pennsylvania milk dealer to furnish certain milk to the purchasing and contracting officer of the Quartermaster at Indiantown Gap, Pennsylvania. The transaction is completed at Indiantown Gap merely by the delivery of the completed product at that destination. Until the milk reaches its destination the transaction is unquestionably carried on within the limits of Pennsylvania over which Pennsylvania alone has jurisdiction. The fact that the ultimate delivery is made to an officer of the United States does not take away the power of the State of Pennsylvania to regulate the entire transaction. This is made clear in the case of UNITED STATES v. PRESS PUBLISHING CO., 219 U. S. 1, 31 S. Ct. 212 (1911), cited with approval in PEOPLE OF PUERTO RICO v. SHELL CO., 302 U. S. 253, 266, 58 S. Ct. 167 (1937). In that case the defendant company was indicted in the United States District Court for criminal libel. The libel charged was in circulating copies of its newspaper containing alleged libelous matter upon United States land at West Point, New York, and in the New York City post office. The newspapers were printed in New York City by the defendant company, a New York corporation. The Act of Congress of July 7, 1898, 30 Stat. 717, sec. 2, incorporated the criminal laws of the several states in force on July 1, 1898, into the Statute and made such criminal laws to the extent of such incorporation, laws of the United States. A motion was made to quash the indictment because the libel had not been committed entirely within the United States property and was therefore punishable only in the

state courts of New York. The motion was granted and on appeal the judgment was affirmed, the Supreme Court saying:

> "In view of the unity between the act of composing and the primary publication of a newspaper containing a libelous article within the State of New York, and of subsequent publications or repetitions thereof by the publisher of the newspaper which are clearly the resultant of the provisions of the laws of New York above quoted and referred to, two propositions are, we think, plainly established: First, that adequate means were afforded for publishing the circulation of the libel on a United States reservation by the state law and in the state courts without the necessity of resorting to the courts of the United States for redress. Second, that resort could not be had to the courts of the United States to punish the act of publishing a newspaper libel by circulating a copy of the newspaper on the reservation upon the theory that such publication was an independent offense, separate and distinct from the primary printing and publishing of the libelous article within the State of New York, without disregarding the laws of that state and frustrating the plain purpose of such laws, which was that it should be by a single prosecution and conviction. * * *
>
> "It follows, therefore, that we do not now intimate that the rule which in this case has controlled our decision would be applicable

> to a case where an indictment was found in a court of the United States for a crime which was wholly committed on a reservation, disconnected with acts committed within the jurisdiction of the state, and where the prosecution for such crime in the courts of the United States instead of being in conflict with the applicable state law was in all respects in harmony therewith."

What was said in that case is equally applicable here. The unity between the acts of obtaining the milk from producers, pasteurizing it, bottling it, allocating it and transporting it are so necessary to the ultimate sale that the entire transaction is subject to the regulations of the State of Pennsylvania and do not escape regulation simply because ultimate delivery is made to an officer of the United States.

The same view was taken by the court below in COMMONWEALTH *v.* ROHRER, 45 Lanc. L. R. 553, 37 Pa. D. & C. 410, 421 (1937, 1939); by the Supreme Court of New Jersey in PATERSON MILK AND CREAM CO. *v.* MILK CONTROL BOARD, 118 N. J. L. 383, 192 A. 838 (1937); and by the Supreme Judicial Court of Massachusetts in MILK CONTROL BOARD *v.* GOSSELIN'S DAIRY, INC., 301 Mass. 174, 16 N. E. (2d) 641 (1938).

In addition, the permit under which the United States Government is using Indiantown Gap, a certified copy of which is in evidence (43a), shows that Indiantown Gap Military Reservation, although now being used by the United States Government, remains subject to the jurisdiction of Pennsylvania. This permit is dated September 30, 1940, and was approved by the Governor on February 21, 1941. This permit by

its very terms is only temporary. No law, sale or lease from Pennsylvania has conveyed exclusive jurisdiction to the United States. No Act of Congress has taken away from the State of Pennsylvania the right to enforce the Milk Control Law.

In JAMES STEWART & Co. *v.* SADRAKULA, 309 U. S. 94, 99 to 100, 60 S. Ct. 431, 433-434 (1940), it was held that where a tract of land was conveyed to the United States for a post office in the State of New York the New York State Laws continued in force on that tract of land unless and until those laws were abrogated by an Act of Congress. In its opinion, by Mr. Justice Reed, the Supreme Court of the United States said (309 U. S. at 99-100):

> "It is now settled that the jurisdiction acquired from a state by the United States whether by consent to the purchase or by cession may be qualified in accordance with agreements reached by the respective governments. The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however small will be left without a developed legal system for private rights. In Chicago, Rock Island & Pacific Railroad v. McGlinn, [114 U. S. 542] supra, a Kansas statute relating to recovery against a railroad for the injury to livestock

> on its right of way existed at the time of the cession to the United States of exclusive jurisdiction over Fort Leavenworth Military Reservation. It was held that the statute was carried over into the law covering the Reservation. Conversely, in Arlington Hotel Company v. Fant, [278 U. S. 430, 49 S. Ct. 227] supra, an Arkansas statute relieving innkeepers, passed after cession of Hot Springs Reservation, was held unavailing as a defense to a Reservation innkeeper's common law liability in accordance with Arkansas law before the cession. Such holdings assimilate the laws of the federal territory, where the Congress has not legislated otherwise, to the laws of the surrounding state."

Later in the opinion the Court said (309 U. S. at 101):

> "With growing frequency the federal government leaves largely unimpaired the civil and criminal authority of the state over national reservations or properties."

In the present case the Milk Control Law became effective April 28, 1937. It remains in effect today. It was in effect on September 30, 1940, the date of this permit. No Act of Congress since that date has abrogated the Milk Control Law. Therefore, the conclusion follows that the Milk Control Law remains in force not only in Pennsylvania generally but upon this military reservation as well.

In JOHNSON *v.* MARYLAND, 254 U. S. 51, 41 S. Ct. 16 (1920), cited in appellant's brief, it was held that a

government employee did not have to have a state motor vehicle driver's license to operate a United States mail truck on a United States post road. However, in a case where an independent contractor was carrying mail for the United States, it was held that a state license was required to use the state highways: STATE *v.* WILES, 116 Wash. 387, 199 Pac. 749, 18 A. L. R. 1163 (1921), cited with approval in MILK CONTROL BOARD *v.* GOSSELIN'S DAIRY, 301 Mass. 174, 16 N. E. (2d) 641, 643 (1938), a case similar to the present one.

In OHIO *v.* THOMAS, 173 U. S. 276, 19 S. Ct. 453 (1899), cited in appellant's brief, a superintendent of a federal soldier's home was prosecuted for serving oleomargarine in the dining hall of the home without having placed placards in the hall as specified in an Ohio statute. These facts show that the only act prosecuted was one that took place entirely upon the federal premises. Nothing done off those premises was involved. The prosecution was therefore directed solely against the federal government. In the present case, however, the milk is produced, hauled to the dealer's plant, mingled with other milk, processed, bottled and started on its journey to the cantonment on state land. Being a transaction depending upon a material part of its performance being done on state land, it is subject to the state law: UNITED STATES *v.* PRESS PUBLISHING CO., 219 U. S. 1, 31 S. Ct. 212 (1911), holding that libels completed by publication at West Point Military reservation and at a United States Post Office were punishable by New York State, wherein the libelous papers were prepared, printed and shipped to the United States lands, and not by the United States.

Appellants rely upon BALDWIN v. G. A. F. SEELIG, INC., 294 U. S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935), in which it was held that the State of destination of milk moving in interstate commerce cannot fix the minimum prices to be paid producers in the State of origin of that milk. That case has no analogy here. If there is any such milk case that does have an analogy with the present case it is the MILK CONTROL BOARD v. EISENBERG FARM PRODUCTS, 306 U. S. 346, 59 S. Ct. 528, 83 L. Ed. 752 (1939). In that case it was held that where milk is handled in interstate commerce the State of origin may fix minimum prices to be paid producers for milk sold for shipment to another state unless and until Congress exercises its paramount right to fix such prices.

II. ENFORCEMENT OF THE COMMISSION'S MINIMUM PRICE ORDER DOES NOT CONFLICT WITH FEDERAL STATUTES REQUIRING COMPETITIVE BIDDING.

There has been no attempt in the present case to impose upon the United States a minimum price greater than or different from the minimum prices applicable to other purchasers similarly situated.

The United States contends that since bids for governmental supplies must be let to the lowest responsible bidder under Section 3709 of the United States Revised Statutes, 41 U.S.C.A., section 5, and 10 U.S.C.A., sections 1200 and 1201, it is mandatory upon milk dealers who bid to violate the minimum price control laws of the states in which they op-

erate in order to become the successful bidders. Such a contention seems untenable. Surely the Government would not contend that low bidders should be receivers of stolen goods in order to obtain Government contracts. There seems to be little reason why it is less lawful to violate one group of laws than another, and yet the Federal Government is here encouraging the violation of both state and federal laws in order to effect an illusory saving. The United States is required to grant bids to the lowest responsible bidders. This does not mean, however, that because a bidder is the lowest bidder he is necessarily responsible. In O'Brien *v.* Carney, 6 Fed. Supp. 761 (D. C. Mass, 1934), it was held that government officers have discretion in selecting the lowest responsible bidder, and that a contract may be awarded to one who is not the lowest bidder if he is the lowest bidder, whom the government officer deems responsible. It is respectfully submitted that a contractor who does not comply with the state laws to which he is subject should not be considered a "responsible bidder."

In United States *v.* Brookridge Farms, Inc., 111 Fed. (2d) 461 (C.C.A. 10, 1940), it was held that in selecting the lowest responsible bidder for milk government officers have discretion to select a bidder who is not the lowest bidder but who appears to be the only one having adequate equipment and facilities to fulfill the contract.

In Perkins *v.* Lukens Steel Co., 310 U. S. 113, 60 S. Ct. 869 (1940), holding that bidders on Government construction contracts have no standing to contest wage determinations by the Secretary of Labor under

the Public Contracts Act of June 30, 1936, 49 Stat. 2036, 41 U. S. C. A. section 35 et seq., it was pointed out that the purpose of Section 3709 of the Revised Statutes, 41 U. S. C. A. section 5, is to protect the United States from foolish expenditures by its officers —not to confer rights upon bidders. The Court said (310 U. S. at 126 to 127):

> "Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders. The United States needs the protection of publicity, form, regularity of returns and affidavit (Rev. Stat., secs. 3709, 3718-3724, 3745-3747), in order to prevent possible frauds upon it by officers. A private person needs no such protection against a written undertaking signed by himself. The duty is imposed upon the officers of the government, not upon him. That duty is owing to the Government and to no one else.
>
> "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of

supplies, and which create duties to the Government alone. It has done so in the Public Contracts Act."

In PACIFIC COAST DAIRY, INC. *v.* DEPARTMENT OF AGRICULTURE, 275 October Term, 1942, now pending, it was pointed out by the Supreme Court of California that Regulation 5-240 (g) of the United States Army provided that under the exemption from competitive bidding "Where it is impracticable to secure competition" under the Federal Act was included the situation "(3) when the price is fixed by Federal, State, municipal or other competent authority."

At pages 66 to 72 of the Record will be found the history of this regulation and a change in the regulation after this case arose in an attempt to reinterpret the meaning of the federal statute.

The same situation existed in ZEUGER MILK CO. *v.* PITTSBURGH SCHOOL DISTRICT, 334 Pa. 277, 5 A. (2d) 885 (1939). In that case the Milk Control Board established minimum prices to be paid for milk after the school district entered into a contract with the milk company to furnish milk for a period of a year. After the order of the Milk Control Board became effective the milk company billed the school district at the minimum rate fixed by the Milk Control Board, which was higher than the contract rate. The school district refused to pay the bill for the milk but insisted that the milk be delivered. After the time of the contract had expired the milk company sued the school district for the differences between the order prices and the contract prices. The milk company was allowed to recover, even though the school district contended that the change in price had brought about

a new contract which could not lawfully be made except by public advertisement and award of the contract to the lowest bidder. Section 708 of the Act of May 18, 1911, P. L. 309, 24 PS Section 830, so provides. The Army contract is subject to the same change of price as the contract of the school district. UNITED STATES *v.* OKLAHOMA GAS AND ELECTRIC Co., 297 Fed. 575 (C. C. A. 8, 1924), cited above.

In SPAHN *v.* STEWART, 268 Ky. 97, 103 S. W. (2d) 651 (1937) it was held that an ordinance in accordance with a state statute and federal grant prescribing minimum wages and maximum hours of workmen on a municipal housing project was not invalid on the ground that it violated the city charter requiring contracts to be let on "competitive bidding" to the lowest and best bidder. In holding that the prescribing of minimum wages and maximum hours for workmen on the project did not stifle competition in the bidding of contractors to do the construction, the Court of Appeals of Kentucky said (103 S. W. (2d), at 659-660):

> "There is no avoidance of competitive bidding here. We have defined 'competitive bidding' to be such as 'requires that all bidders be placed on a plane of equality, and that they bid upon the same terms and conditions.' State Highway Commission v. King, 259 Ky. 414, 82 S. W. (2d) 443, 450. 'Competitive bidding means that the council must, by due advertisement give opportunity for every one to bid.' Blanton v. Town of Wallins, 218 Ky. 295, 291 S. W. 372, 375. In City of Springfield v. Haydon, supra, we upheld a contract

let on bid, in which the proposal called for a material possible of being furnished by only one concern in the entire country, saying that there is competitive bidding 'unless the advantage, by its terms, excludes other bidders.' Gathright v. Byllesby & Co., 154 Ky. 106, 133, 157 S. W. 45, 57. In the case of Denton v. Carey-Reed Co., 169 Ky. 54, 183 S. W. 262, 263, where only one bid was received for street reconstruction, we held that the contract was valid since there was a reasonable bid, 'fairly made at a public letting, legally advertised and open to all.' Appellants, or any party feeling aggrieved at any action taken by the commission in attempting to let proposed contracts, may in a proper proceeding raise any question of unfairness or illegal procedure."

III. THE UNITED STATES HAS NOT EXERCISED ANY WAR OR EMERGENCY POWER THAT WOULD OUST THE PENNSYLVANIA MILK CONTROL COMMISSION OF AUTHORITY TO REGULATE THE APPELLANT MILK DEALER IN THIS TRANSACTION

It would undoubtedly be possible for Congress to prescribe in its laws a method by which the Federal Government would control the production, processing, bottling and distribution of milk within its reservations and even within the territory surrounding the reservations. Such a possibility is shown by the Act of Congress passed during the World War by which

Congress enabled the Secretary of War to designate areas within which it would be unlawful to maintain houses of ill-fame near military camps, stations, forts, posts, cantonments, training grounds, and places of mobilization. Section 13 of the Act of Congress of May 18, 1917, c. 15, 40 Stat. 83, as amended by the Act of July 9, 1918, c. 143, 40 Stat. 885; 50 U. S. C. A. Appendix, section 213, provides:

> "During the present emergency it shall be unlawful, within such reasonable distance of any military camp, station, fort, post, cantonment, training or mobilization place as the Secretary of War shall determine to be needful to the efficiency and welfare of the Army, and shall designate and publish in general orders or bulletins, to engage in prostitution or to aid or abet prostitution or to procure or solicit for purposes of prostitution, or to keep or set up a house of ill fame, brothel, or bawdy house, or to receive any person for purposes of lewdness, assignation, or prostitution into any vehicle, conveyance, place, structure, or building, or to permit any person to remain for purposes of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure, or building; and any person, corporation, partnership, or association violating the provisions of this shall, unless otherwise punishable under the Articles of War [section 1471 et seq. of Title 10], be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

and any person subject to military law violating this chapter shall be punished as provided by the Articles of War [section 1471 et seq. of Title 10]; and the Secretary of War is hereby authorized, empowered, and directed to do everything by him deemed necessary to suppress and prevent violation thereof."

Prosecutions for conducting houses of ill-fame were sustained in a number of cases including UNITED STATES *v.* CASEY, 247 Fed. 362 (D. C. Ohio, 1918), and PAPPENS *v.* UNITED STATES, 252 Fed. 55, 57 (C. C. A. 9th, 1918). In both these cases it was contended that this Act of Congress was an interference with the police powers of the State, and in both cases it was held that Congress had power to enact such a law. The fullest discussion of this matter is contained in UNITED STATES *v.* CASEY, 247 Fed. 362, at 365, which points out that this power of Congress is one that supersedes the State power of regulation only when Congress in its discretion passes such laws:

> "It is charged that the act is unconstitutional, as an assumption of and an attempt to interfere with the police power of the state to regulate the morals of its citizens, and as an invasion of the reserved powers of the state. That the state in the exercise of its police power has the right to legislate, and in pursuance of that right has legislated, to control the morals of its citizens, and may prosecute the keepers of bawdy-houses, is freely conceded; but their conviction and sentence for that offense in the state court, had

action been taken against them there, would not bar their prosecution in this court. Cross v. North Carolina, 132 U. S. 131, 139, 10 Sup. Ct. 47, 33 L. Ed. 287; Sexton v. California, 189 U. S. 319, 323, 23 Sup. Ct. 543, 47 L. Ed. 833; Byrne, Fed. Crim. Proc. sec. 211. "The attitude of the government is that Congress, not in the exercise of the police power, but in the exercise of the war power conferred upon it by the federal Constitution, may also, as a matter of right, prohibit the presence of such places within the prescribed territory without encroaching on the jurisdiction of the state. The extent of such war power is therefore the interesting and important question for decision. If the statute is a valid exercise of that power, then it is a part of the supreme law of the land, and all persons are subject to it."

Since Congress has not attempted to make such regulations concerning the production, processing, bottling and distribution of milk in and about its reservations, the power to make such regulations remains with the states. See UNITED STATES v. BETHLEHEM STEEL CORPORATION, 315 U. S. 289, 62 S. Ct. 581 (1942), cited above.

Milk price control laws had their beginning on May 17, 1933, when the New York Milk Control Law, New York Laws of 1933, Article XXV, c. 158, became effective. The limitations of state regulation of minimum prices to be paid for milk where the state attempted to regulate the price of milk coming to it from other states (BALDWIN v. SEELIG, 294 U. S. 511, 55

S. Ct. 497 (1935)) led to the enactment of milk price control legislation by Congress. The Act of Congress of August 24, 1935, c. 641, section 5, 49 Stat. 753, as amended, 7 U. S. C. A., sections 601 et seq., especially section 608c, provides a system of prescribing minimum prices to be paid producers for milk moving in, affecting or burdening interstate commerce. Subdivision (i) of section 10 of the Act of Congress of May 12, 1933, c. 25, Title I, 48 Stat. 37, as amended and reenacted by the Agricultural Marketing Agreement Act of 1937, as amended, quoted above under "Statutes Involved", shows an intent to encourage such state price-fixing orders as the one here involved.

CONCLUSION

It is, therefore, respectfully submitted that the regulations of a Pennsylvania milk dealer here sought to be enforced are in conformance with the laws of Pennsylvania and with the laws of the United States; that they not only carry out the purposes of the Milk Control Law of Pennsylvania but the purposes of the milk control laws of the United States and the United States criminal laws as well; and that the order appealed from should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 399.—October Term, 1942.

Penn Dairies, Inc., and the United States of America, Appellants, *vs.* The Milk Control Commission of the Commonwealth of Pennsylvania. } Appeal from the Supreme Court of the Commonwealth of Pennsylvania.

[March 1, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Decision of this case turns on the question whether the minimum price regulations of the Pennsylvania Milk Control Law of April 28, 1937, P. L. 417, Purdon's Pa. Stat. Ann., Tit. 31, § 700j, may constitutionally be applied to the sale of milk by a dealer to the United States, the sale being consummated within the territorial limits of the state in a place subject to its jurisdiction.

The Pennsylvania Milk Control Law establishes a milk control commission, § 201, with authority to fix prices for milk sold within the state wherever produced, §§ 801-803, including minimum wholesale and retail prices for milk sold by milk dealers to consumers, § 802, and to issue rules, regulations and orders to effectuate this authority, § 307.

In the fall of 1940 the United States established, under a permit from the Commonwealth of Pennsylvania, a military encampment on lands belonging to the Commonwealth. As is conceded, the permit involved no surrender of state jurisdiction or authority over the area occupied by the camp. On February 1, 1941, the purchasing and contracting officer at the encampment, an officer of the Quartermaster's Corps of the United States Army, invited bids for a supply of milk for the period from March 1 to June 30, 1941, for consumption by troops stationed at the camp. On Febraury 4, the Milk Control Commission sent a notice to interested parties, including appellant, Penn Dairies, Inc., a Pennsylvania corporation, addressed to "all milk dealers interested in submitting bids to furnish milk to the United States Government" at the encampment. The notice was accompanied by the Commission's Official General Order No. A-14, § 4-B of which pre-

scribed the "minimum wholesale prices to be charged by or paid to milk dealers". The notice announced that the unit prices specified for sales to institutions by that section of the order should be considered in the preparation of bids and that sales of milk at prices below the prescribed minima would be construed as violations of the milk control law. The dairy submitted a bid offering to sell milk in wholesale quantities at prices substantially below those prescribed by the Commission. Its bid was accepted by a War Department Purchase Order of March 1, 1941, the contract was awarded to it as the lowest bidder, and it performed the contract by deliveries of the milk at the contract price—all within the state.

On March 5, 1941, the Commission, pursuant to §§ 404 and 405 of the Milk Control Act, issued a citation to the dairy to show cause why its application for a milk dealer's license for the year beginning May 1, 1941, should not be denied because of its sale and delivery of the milk at prices below the minima fixed by the Commission's order. Section 404 makes the grant of a license mandatory save in circumstances not now material, but provides that the Commission may deny or cancel a license where the applicant or licensee "has violated any of the provisions of this Act or any of the rules, regulations or orders of the Commission . . ."

The dairy's answer to the citation challenged the constitutional authority of the State to regulate prices charged to the United States. After a hearing the Commission denied the dairy's license application because of its sale of milk to the United States at prices below those fixed by the Commission. The Commission's order was sustained on review by the Court of Common Pleas of Lancaster County. The Superior Court affirmed this judgment, 148 Pa. Super. 261, in an opinion which was adopted by the Supreme Court of Pennsylvania, 344 Pa. 635, both courts holding that the Commission's price-fixing order was applicable to sales of milk made to the United States, and that as thus applied the statute did not impose an unconstitutional burden on the United States or otherwise infringe the Constitution or laws of the United States. The case comes here on appeal under § 237 of the Judicial Code. The government was granted leave to intervene in the Court of Common Pleas, and has participated in all subsequent stages of the litigation.

Appellants urge that the Pennsylvania Milk Control Act, as applied to a dealer selling to the United States, violates a constitutional immunity of the United States, and also conflicts with federal legislation regulating purchases by the United States and therefore cannot constitutionally apply to such purchases.

Appellants' first proposition proceeds on the assumption that local price regulations normally controlling milk dealers who carry on their business within the state, when applied to sales made to the government, so burden it or so conflict with the Constitution as to render the regulations unlawful. We may assume that Congress, in aid of its granted power to raise and support armies, Article I, § 8, cl. 12, and with the support of the supremacy clause, Article VI, § 2, could declare state regulations like the present inapplicable to sales to the government. Cf. *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21, 33; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 101-04; *Parker* v. *Brown*, No. 46, January 4, 1943, p. 6, and cases cited. But there is no clause of the Constitution which purports, unaided by Congressional enactment, to prohibit such regulations, and the question with which we are now concerned is whether such a prohibition is to be implied from the relationship of the two governments established by the Constitution.

We may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. *Ohio* v. *Thomas*, 173 U. S. 276; *Johnson* v. *Maryland*, 254 U. S. 51; *Hunt* v. *United States*, 278 U. S. 96; *Arizona* v. *California*, 283 U. S. 423. But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions. *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 524-5; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149; *Buckstaff* v. *McKinley*, 308 U. S. 359, 362-63 and cases cited; cf. *Susquehanna Co.* v. *Tax Comm'n*, 283 U. S. 291, 294; *Helvering* v. *Producers Corp.*, 303 U. S. 376, 385-86, and the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government from state taxation or regulation. *Alabama* v. *King & Boozer*, 314 U. S. 1, 9, and cases

cited; *Baltimore and Annapolis R. Co.* v. *Lichtenberg*, 176 Md. 383, s. c., *United States* v. *Baltimore and Annapolis R. Co.*, 308 U. S. 525.

Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, 148 Pa. Super. 270-71. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see *Baldwin* v. *Seelig*, 294 U. S. 511. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama* v. *King & Boozer, supra;* or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in *Baltimore & Annapolis R. Co.* v. *Lichtenberg, supra;* or the local building regulations applied to a contractor engaged in constructing a postoffice building for the government, sustained in *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94.

The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see *Metcalf & Eddy* v. *Mitchell, supra*, 523-24. And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be

implied from the Constitution which established the system, see *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, 488, 487.

Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require. *Reconstruction Finance Corp.* v. *Menihan Corp.*, 312 U. S. 81, and cases cited; *Colorado Bank* v. *Bedford*, 310 U. S. 41, 53, and cases cited; cf. *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209. Our inquiry here, therefore, must be whether the state's regulation of this contractor in a matter of local concern conflicts with Congressional legislation or with any discernible Congressional policy.

To establish such a conflict the government places its reliance on Acts of Congress requiring competitive bidding in the purchase of supplies for the Army. Section 3709 of the Revised Statutes, 41 U. S. C. § 5, requires public advertising for all government purchases save "when immediate delivery or performance is required by the public exigency."[1] A similar provision had appeared in § 5 of the Act of March 3, 1809, 2 Stat. 536, which required all purchases by the Treasury, War or Navy Departments to be made "by open purchase or by previously advertising for proposals respecting the same". The Appropriation Act of March 2, 1901, 31 Stat. 905, and subsequent appropriation acts, included a provision requiring public advertising for the purchase of all supplies for the use of the Army, with exceptions not now material, "except in case of emergency or where it is impracticable to secure competition" and requiring the purchase of such supplies "where the same can be purchased the cheapest, the quality and cost of transportation and the interests of the Government considered". 10 U. S. C. § 1201. And a provision enacted as part

[1] This provision was derived from § 10 of the Appropriation Act of Mar. 2, 1861, 12 Stat. 220, which in turn was a reenactment of § 3 of the Appropriation Act of June 23, 1860, 12 Stat. 103. Like the Act of March 2, 1901, R. S. § 3709 has been construed as inapplicable where competition is impracticable. 38 Op. Atty. Gen. 164, 174; 39 Op. Atty. Gen. 111; 17 Op. Atty. Gen. 84, 87.

of the Appropriation Act of July 5, 1884, 23 Stat. 109, 10 U. S. C. § 1200, requires that all purchases of quartermaster's supplies be made by contract after public notice and that the award be made to "the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids".

It is to be noted that while these statutes direct government officials to invite competitive bidding by contractors undertaking to furnish Army supplies, and also require them to accept the lowest responsible bid if any is accepted, they do not purport to set aside local price regulations or to prohibit the states from taking punitive measures for violations of such regulations. They are wholly consistent with the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the lowest bid, or the omission of competitive bidding in circumstances where local price regulations render it "impracticable to secure competition". Nor are we able to discern, in the language or legislative history of these or related statutes regulating government contracts, any indication that low cost was such a controlling consideration with Congress as to justify an inference that Congress intended to displace state regulations affecting the price of articles purchased by the government. The reason for the passage of § 5 of the Act of March 3, 1809, has been said to be "to throw additional safeguards around this subject; to prevent favoritism, and to give to the United States the benefit of competition . . . .". 2 Op. Atty. Gen. 257, 259.

We are not advised of any statute in which Congress has undertaken to set aside state laws affecting the price of goods supplied to the government in order to secure a lower price than would otherwise be obtainable. And Congress has often required the inclusion in government contracts of terms not directly related to the interests of the government as purchaser, which have the effect of increasing cost. Title III, § 2 of the Act of March 3, 1933, 47 Stat. 1520, 41 U. S. C. §§ 10(a)-10(c), requires the use of American-produced goods on all public works contracts unless the head of the department finds that the use of such materials is "impracticable" or would "unreasonably increase the cost". The Eight-Hour Law of August 1, 1892, 27 Stat. 340, as amended, 40 U. S. C. §§ 321-326, limits to eight hours per day the work of persons employed by contractors with the government and requires all government contracts to include provisions to that effect. The Davis-Bacon Act of March 3, 1931, 46 Stat. 1494, as amended, 40 U. S. C.

§ 276(a), requires all contracts for public buildings to contain prevailing minimum wage provisions, and the Walsh-Healy Act, 49 Stat. 2036, 41 U. S. C. § 35, requires the inclusion in all government contracts in excess of $10,000 of provisions requiring the contractor's adherence to prescribed minimum wages, maximum hours, restrictions on employment of child labor and requirements for safety of working conditions.[2]

Evidence is wanting that Congress, in authorizing competitive bidding, has been so concerned with securing the lowest possible price for articles furnished to the government that it wished to set aside all local regulations affecting price. On the contrary Congress has regarded the field of public contracts as one over which to exercise its supervisory legislative powers in safeguarding interests which may conflict with the needs of the government viewed solely as purchaser. An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication, *United States* v. *Borden*, 308 U. S. 188, 198-9; *United States* v. *Jackson*, 302 U. S. 628, 631; *Posadas* v. *National City Bank*, 296 U. S. 497, 503-5, should be at least as

[2] The Military Appropriation Act of 1941, 55 Stat. 372, requires the purchase of food and clothing produced in the United States unless none of satisfactory quality is available in sufficient quantity and at "reasonable prices". And successive Appropriation Acts materially restrict the use of appropriated funds by the Quartermaster's Corps to purchase oleomargarine or butter substitutes. E. g. 49 Stat. 1285, 50 Stat. 449, 52 Stat. 649, 53 Stat. 600, 54 Stat. 358, 55 Stat. 372. See also R. S. § 3716, 10 U. S. C. § 1202 (preference to articles of domestic production "conditions of price and quality being equal").

The War Department, by Procurement Circular No. 4, February 9, 1938, and Procurement Circular No. 10, January 26, 1942, issued pursuant to Par. 5(h) of AR 5-140, provided for the inclusion in Army contracts of provisions requiring the bidder to certify to his compliance with any applicable marketing agreement, license, or order, executed or issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. §§ 601 *et seq.* All Procurement Circulars have since been rescinded, see *infra* n. 3.

See also Executive Order No. 325-A, May 18, 1905 (convict labor), temporarily suspended by Executive Order No. 9193, July 9, 1942; Executive Orders Nos. 6246, Aug. 10, 1933, and 6466, March 14, 1934 (compliance with Codes of Fair Competition).

Despite the enactment of § 201 of the First War Powers Act, Dec. 18, 1941, 55 Stat. 839, empowering the President to authorize contracts to be entered into without regard to provisions of existing law, the Walsh-Healy Act, the Davis-Bacon Act, and the Eight Hour Law remain applicable to all government contracts, Executive Order No. 9001, Dec. 27, 1941.

persuasive when the question is one of the nullification of state power by Congressional legislation.

Hence, in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable, we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government's pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.

The government, in support of its position, points to Army Regulation 5-100, Paragraph 11d, which was in effect at the time this contract was entered into and performed,[3] and which read as follows:

"State price-fixing laws.—Appropriated funds may not be used for payments under awards upon invitations for bids containing restrictive requirements of showing compliance with State price-fixing laws relating to services, commodities, or articles necessary to be purchased by the United States until there has been an authoritative and final judicial determination that such State statutes are applicable to such contracts. It is not the duty or responsibility of contracting officers of the Federal Government, by means of restrictive specifications, to enforce contractors to comply with the requirements of price-fixing acts of a State. See 16 Comp. Gen. 97, 348; 17 id. 287; 19 id. 614."

[3] All of the Army Regulations and Procurement Circulars referred to in this opinion were rescinded on the adoption of War Department Procurement Regulations, effective July 1, 1942, Code of Federal Regulations, Title 10, § 81, 7 Fed. Reg. 8082. See Procurement Regulation 1, Pars. 102, 103. Paragraph 209 of Procurement Regulation 2—issued under the authority of § 201 of the First War Powers Act, December 18, 1941, 55 Stat. 839, and Executive Order No. 9001, December 27, 1941—provides that all contracts shall be placed by negotiation save where formal advertising is authorized by the Director of Purchases of the War Production Board.

Two observations are to be made with respect to this regulation. The statutes authorizing the Secretary of War "to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department," 20 Stat. 36, 22 Stat. 487, 5 U. S. C. § 218, give no hint of any delegation to the Secretary or his subordinates of power to do what Congress has failed to do—restrict the application of local regulations, otherwise applicable to government contractors, which increase price. And the regulation itself is at most a direction to contracting officers not to assume by their specifications for bids any responsibility for requiring compliance with local price regulations before it is judicially determined whether such regulations are applicable to government contracts.

That such is the meaning of the regulation is made plain by reference to the opinions of the Comptroller General, cited in the regulation. All rest on the reasoning of *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, and like cases, which were overruled in *Alabama* v. *King & Boozer*, *supra*. The Comptroller General held that since the constitutional applicability of local price regulations to government contractors was doubtful, the right of the government to challenge their validity should not be foreclosed by contractual provisions, and that in the absence of a judicial determination of their applicability a bid which failed to comply with such price regulations could not for that reason be rejected.

When Paragraph 11d was adopted, Paragraph 4g of Army Regulation 5-240 defined the situations in which, because it was deemed "impracticable to secure competition", supplies might, under 10 U. S. C. § 1201, be purchased in the open market without advertising. Paragraph 4g(3) declared that such a situation arose "when the price is fixed by federal, state, municipal or other competent legal authority", a clear indication that state price regulations were not thought to be inapplicable to sales under Army contracts.[4] After the present suit was begun subpara-

[4] In a memorandum to the Undersecretary of War dated April 16, 1941, after the present litigation had been instituted, the Judge Advocate General expressed the opinion that in view of the apparent conflict between the terms of AR 5-240, Par. 4g(3) and AR 3-100, Par. 11d (at that time renumbered as Par. 11e), the former regulation applied only in exceptional situations and was not effective to make applicable to government contractors price-fixing regulations such as that here involved. The Judge Advocate General referred to the "consistent position" taken by the War Department "that price-fixing measures of the states have no application to procurements by the War Department". But we do not understand from this or other memoranda of the Judge Advocate General that the position referred to is any broader than that expressed in Par. 11d of AR 5-100 and in the opinions of the Comptroller General to which that paragraph refers.

graph 3 was eliminated. The only effect of this elimination was to remove the conflict of that paragraph with the "hands off policy" of the War Department adopted by Army Regulation 5-100, Paragraph 11d.

Even though it be assumed that the Secretary could by regulation set aside the state price legislation which it has made applicable to government contractors, he plainly has not done so. He has left the question of its applicability to be settled by this Court's determination of the scope of the government's immunity under the laws and Constitution of the United States. In the meantime he has adopted a specific policy of not including, in government contracts, terms requiring the contractor's compliance with state price fixing legislation, thus avoiding any action which could be construed as an assent to the application of such legislation to government contractors in circumstances, if any, where it would without affirmative assent be inapplicable.

We are unable to find in Congressional legislation, either as read in the light of its history or as construed by the executive officers charged with the exercise of the contracting power, any disclosure of a purpose to immunize government contractors from local price-fixing regulations which would otherwise be applicable. Nor, in the circumstances of this case, can we find that the Constitution, unaided by Congressional enactment, confers such an immunity. It follows that the Pennsylvania courts rightly held that the Constitution and laws of the United States did not preclude the application of the Pennsylvania Milk Control Law to appellant Penn Dairies, Inc., by denial of its license application.

Affirmed.

Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

Mr. Justice MURPHY, concurring.

I agree with the opinion of the Court that neither Congressional legislation nor the implications of the Constitution prevent the application of the minimum price requirements of the Pennsylvania Milk Control Law to the sale of milk by a dealer to the United States, but wish to emphasize a phase of the question which I believe is most important.

We are not concerned here with just an ordinary state regulatory statute of non-discriminatory character which affects the federal government in some degree, but with a general measure designed to safeguard the health and well-being of the public by insuring an adequate supply of wholesome milk at stable prices.[1] The preservation of public health is a matter of grave and primary concern to the states and the nation at all times, but even more so in time of war. Then indeed a healthy citizenry is essential to national survival, for the waging of modern "total war", if it is to be done with maximum effectiveness, requires a sound and healthy people, as well as a sturdy fighting force.

In this country with its heterogeneous population living under diverse conditions in widely separated areas, state and local authorities are best qualified to determine what measures are most appropriate and necessary to promote the health and well-being of the people within their borders, and they should be given the widest possible latitude to solve their special problems as they think best. The whole framework of our federal system is based upon this principle. It has contributed to our strength and solidarity as one people. It should be the aim of all federal procurement officers, military or civilian, to harmonize their work so far as possible with this broad policy of government. Such an aim is in accord with the spirit of our laws and the character of our institutions and will best insure whole-hearted support of the military program.

In my opinion it is of greater importance to the nation at war and to its military establishment that high standards of public health be maintained than that the military procurement authorities have the benefit of unrestrained competitive bidding and lower prices in the purchase of needed milk supplies. That the United States must pay 1.6¢ more per quart for milk in Pennsylvania hardly means the collapse of the war effort. But it is common knowledge that armies frequently suffer more from the ravages of disease and sickness than from the perils of combat, and, if

[1] Section 101 of the Pennsylvania law declares that the milk industry "is a business affecting the public health and affected with a public interest", and that the purpose of the Act is to regulate and control the industry "for the protection of the public health and welfare and for the prevention of fraud". Section 301 requires the Milk Control Commission to ascertain and maintain such prices for milk "as will be most beneficial to the public interest, best protect the milk industry of the Commonwealth and insure a sufficient quantity of pure and wholesome milk to the inhabitants of the Commonwealth, having special regard to the health and welfare of children residing therein".

milk vendors dealing with the United States need not comply with Pennsylvania's minimum price requirements, the effectiveness of Pennsylvania's law is considerably reduced for it is conceded that the instant order is the largest single one ever given for milk within the State. This reduced effectiveness may have serious and unwanted repercussions not only upon civilian health but that of the military personnel stationed there as well.

In the conduct of the war as well as in other relations, the larger interests of the federal government and the nation as a whole will not suffer, nor will constitutional arrangements be prejudiced, if procurement officers are obliged to conduct their activities within the general framework of state laws enacted within reasonable limits to safeguard the public health and safety. If Alabama for the purpose of revenue can, consistently with the Constitution, require government contractors to pay sales and use taxes upon materials used in a cost plus a fixed fee construction contract, the effect of which is to increase the cost of construction to the federal government (*Alabama* v. *King & Boozer*, 314 U. S. 1; *Curry* v. *United States*, 314 U. S. 14), there is all the more reason why Pennsylvania, acting to protect the public health, can require, until Congress makes clear its wishes otherwise, a dealer selling milk to the United States to adhere to its minimum price requirements. This is not to say that the States may exercise direct control over the actions of federal officials, military or otherwise, or that Congress may not invalidate or suspend local regulations insofar as they affect transactions with the federal authorities. If Congress determines that the enforcement of the Pennsylvania law against dealers selling to the United States interferes with its power to wage war, and forbids its application to them, we have a different question. *See Fed. Land Bank* v. *Bismarck Co.*, 314 U. S. 95. As yet it has not done so, and in the absence of such a measure, I can perceive no necessity or adequate justification either in law or constitutional theory for holding Pennsylvania's regulation void as applied here.

Mr. Justice Douglas, dissenting.

The contract with Penn Dairies was made by the War Department acting through the Quartermaster of the Army. The Quartermaster Corps, one of the statutory branches of the Regular

Army (41 Stat. 759, 10 U. S. C. §4) is charged "under the authority of the Secretary of War" with the "purchase and procurement for the Army of all supplies of standard manufacture and of all supplies common to two or more branches" of the Army, with exceptions not material here. 39 Stat. 170, 41 Stat. 766, 10 U. S. C. § 72. The procedure which controls purchases of supplies by the Quartermaster Corps is governed by the statutes and by the Army Regulations. There are statutory requirements for competitive bidding as respects the purchase of "all supplies"[1] and with particular reference to supplies purchased "for immediate use".[2] The only exception relevant here is the case "where it is impracticable to secure competition." 10 U. S. C. § 1201. The policy is plain—it is intended that the United States should get the full benefit of price competition in its purchases of Army supplies. See *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318.

Statutory authority is vested in the Secretary of War to prescribe rules and regulations covering the preparation, submission, and opening of bids "for contracts under the War Department." 20 Stat. 36, 22 Stat. 487, 5 U. S. C. § 218. The Secretary pursuant to this authority has issued numerous regulations governing competitive bidding. Regulation No. 5-100, Par. 11d, August 7, 1940, specifically prohibits use of appropriated funds for payments under contracts containing prices fixed by state law "until

1 "Except in cases of emergency or where it is impracticable to secure competition, or in cases otherwise provided for, the purchase of all supplies for the use of the various departments and posts of the Army and of the branches of the Army service shall only be made after advertisement, and said supplies shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered." 31 Stat. 905, 32 Stat. 514, 10 U. S. C. § 1201. And see R. S. § 3709, 41 U. S. C. § 5.

2 "All purchases of regular and miscellaneous supplies for the Army furnished by the Quartermaster Corps for immediate use shall be made by the officers of such corps, under direction of the Secretary of War, at the places nearest the points where they are needed, the conditions of cost and quality being equal: *Provided*, That all purchases of said supplies, except in cases otherwise provided for, and except in cases of emergency, which must be at once reported to the Secretary of War for his approval, shall be made by contract after public notice of not less than ten days for small amounts for immediate use, and of not less than from thirty to sixty days whenever, in the opinion of the Secretary of War, the circumstances of the case and conditions of the service shall warrant such extension of time. The award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids." 23 Stat. 109, 37 Stat. 391, 10 U. S. C. § 1200.

there has been an authoritative and final judicial determination that such State statutes are applicable to such contracts."[3] The policy of the War Department has been well-established. The Judge Advocate General stated in April 1941 that "the War Department has consistently taken and maintained the position that price-fixing measures of the states have no application to procurements by the War Department". Whatever ambiguity may have existed in other regulations has been removed.[4]

We have then regulations of the War Department made pursuant to powers delegated by Congress and which prohibit the Army's contracting officers from waiving competitive bidding merely because prices are fixed by the states. I am unable to see why they are not valid regulations. Congress has said that competitive bidding "shall" be required except where it is "impracticable to secure competition". 10 U. S. C. § 1201. The word "impracticable" does not suggest that wherever there is state price-fixing competitive bidding is not required. A thing is "impracticable" to do when it is infeasible or incapable of being done. The contract which the Quartermaster made with Penn Dairies is conclusive of the fact that it was not "impracticable" to obtain the milk through competitive bidding. A regulation which interprets "impracticable" so as not to preclude competitive bidding because of state price-fixing stays well within the scope of the rule making power. These War Department regulations accordingly "have the force of law". *Standard Oil Co. v. Johnson*, 316 U. S. 481, 484, and cases cited. Their application in this case therefore has no less force and effect than if it was specifically directed by Congress. We have then an

[3] This Regulation reads as follows: "Appropriated funds may not be used for payments under awards upon invitations for bids containing restrictive requirements of showing compliance with State price fixing laws relating to services, commodities, or articles necessary to be purchased by the United States until there has been an authoritative and final judicial determination that such State statutes are applicable to such contracts. It is not the duty or responsibility of contracting officers of the Federal Government, by means of contract specifications, to enforce contractors to comply with the requirements of price fixing acts of a State."

[4] Army Reg. No. 5-240, February 11, 1936, as amended July 6, 1938, provided in paragraph (4)(g)(3) that "purchase may be made in the open market without competition" when the "price is fixed by Federal, State, municipal, or other competent legal authority." It should be noted that this was a permissive and not a mandatory requirement. On May 10, 1941, paragraph (4)(g) was amended so as to omit any reference to governmental price fixing.

an assertion of federal power in the field of price control which by reason of the supremacy clause excludes any exercise of a conflicting state power. See *Sinnot* v. *Davenport*, 22 How. 227; *McDermott* v. *Wisconsin*, 228 U. S. 115; *Pennsylvania R. Co.* v. *Illinois Brick Co.*, 297 U. S. 447; *Hines* v. *Davidowitz*, 312 U. S. 52; *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148.

Mr. Justice BLACK and Mr. Justice JACKSON join in this dissent.